THE JOURNAL OF LIBERTARIAN STUDIES

AN INTERDISCIPLINARY QUARTERLY REVIEW

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NATIONALISM AND LIBERALISM: FRIENDS OR FOES?

David Conway*

During the course of the twentieth century, eruptions of nationalist ardour and aspiration have resulted in great hardship and depredations being visited on various peoples of the world. Few peoples, if any, have escaped becoming engulfed in major conflicts arising from either their own nationalistic aspirations or those of other peoples.

However, national pride and allegiance, in themselves, can seem not merely innocuous but positively benign. Such forms of attachment also foster a *prima facie* attractive cultural diversity among the different peoples of the world. Nationalism can also provide a sense of meaning, belonging, and pride which many people might otherwise have been without. In addition, it can serve to foster solidarity and civility among those who look on each other as being of the same nation.

What should be the attitude of classical liberals toward nationalist aspiration and sentiment? Should classical liberals value and cultivate these attitudes in themselves and others—at least in their ostensibly less xenophobic and aggressive forms? Or should they look on all forms and manifestations of nationalism as nothing more than atavistic remnants of pre-modernity? That is, should nationalism be viewed as an outmoded form of attachment which, ideally, should be expunged from humanity? Should it be replaced by a cosmopolitan individualism the universal adoption of which will mark the liberation of humanity

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from all divisive partial allegiances and attachments? Alternatively, should classical liberals regard nationalist sentiment and allegiance as a purely private matter, one that has nothing to do with their political outlook as such?

For a considerable time after the end of World War II, classical-liberal and libertarian writers paid comparatively little attention to the phenomenon of nationalism or, indeed, to international relations in general, save those issues directly connected with the Cold War and international trade. However, with the end of the Cold War, a dramatic and somewhat unforeseen recent worldwide resurgence of various forms of nationalist aspiration and particularism has led both classical liberals and libertarians to turn their attention to the phenomenon of nationalism.

At first sight, the prospects for effecting a reconciliation between nationalism and classical liberalism seem bleak. With characteristic acumen, Friedrich Hayek has gone to the heart of the problem.

> The advocates of individual freedom have generally sympathised with . . . aspirations for national freedom [that is, with the desire of peoples to be free from foreign yoke and to determine their own fate], and this has led to the constant but uneasy alliance between the liberal and the national movements during the nineteenth century. But though the conception of national freedom is analogous to that of individual freedom, it is not the same; and the striving for the first has not always enhanced the second. It has sometimes led people to prefer a despot of their own race to the liberal government of the alien majority; and it has often provided the pretext for ruthless restrictions of the individual liberty of minorities.[1]

Further, in his famous essay explaining why he is not a conservative, Hayek registers a second reservation about nationalism from a classical-liberal perspective.

> Nationalistic bias frequently provides the bridge . . . to collectivism: to think in terms of "our" industry or resource is only a short step away from demanding that these national assets be directed in the national interest.[2]

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[1]F.A. Hayek, *The Constitution of Liberty* (London: Routledge & Kegan Paul, 1960), pp. 14–15.

[2]Hayek, *The Constitution of Liberty*, p. 405.

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In light of Hayek's concerns, we might feel there is little point in trying to reconcile nationalism and classical liberalism. However, despite the undoubted truths contained in Hayek's misgivings, it still seems worthwhile to attempt such a reconciliation. For, however enlightened and cosmopolitan classical liberals may rightly consider themselves, and however illiberal and barbaric some manifestations of nationalism have undoubtedly been, there can be few classical liberals who, if honest with themselves, will not admit to harbouring deep within their breasts some form of nationalistic attachment and affiliation. These sentiments might manifest themselves only as some inarticulate love for the country and traditions of their birth and residence, combined with some weak and generalised affection for those they regard as their compatriots, but they are, nonetheless, both apparent and real.

TERMINOLOGICAL PRELUDE

We hardly need remind ourselves of an attachment to the ideals and values constitutive of the classical-liberal outlook. They include, most importantly, private property rights and minimal government, and, hence, the utmost equal freedom of thought, expression, activity, and association, together with constitutional representative government, division of powers, and the rule of law.

It is not much more difficult to form a relatively clear and distinct idea of what "nationalism" is. For this term, the *Oxford English Dictionary* lists two distinct but related meanings. The first is *devotion to one's nation*; the second is *a policy of national independence.* Combining these two meanings, we arrive at the following definition of the term: "Nationalism" denotes *the devotion members of a nation feel toward their own nation, as well as the striving by members of a nation on behalf of its political independence, enjoyed, ideally, in that territory considered its traditional homeland.*

However, we shall not be able to decide on the compatibility of, on the one hand, this species of sentiment and aspiration, with, on the other, liberal ideals and values, without first obtaining a clear understanding of what a "nation" is. What, then, is a nation? This question is by no means as straightforward as it first seems. To see wherein the complexity lies, consider Ayn Rand's definition of the term: "A 'nation' is not a mystic or supernatural entity; it is a large number of individuals who live in the same geographical locality under the same

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political system."[3] The first part seems undoubtedly true; the second, though, is questionable.

Is it really true that all people residing in the same geographical locality under the same political system are members of the same nation? Try telling that to Serbs and ethnic Albanians in Kosovo, or to Palestinian Arabs and Jewish settlers on the West Bank of the Jordan River. Again, do members of a nation always reside in the same geographical locality under the same political system? Try telling that to Irish Republican Catholics in West Belfast, or to former residents of East and West Berlin before the Wall came tumbling down, or to former citizens of the Soviet Union.

Rand's definition of a nation clashes with two more nuanced accounts offered by earlier eminent classical liberals. John Stuart Mill once declared,

> A portion of mankind may be said to constitute a Nationality, if they are united among themselves by common sympathies, which do not exist between them and any others—which makes them co-operate with each other more willingly than with other people, desire to be under the same government, and desire that it should be government by themselves or a portion of themselves exclusively.[4]

Likewise, Henry Sidgwick once observed,

> [W]hat is really essential . . . to a Nation is . . . that the persons composing it should have a consciousness of belonging to one another, of being members of one body, over and above what they derive from the mere fact of being under one government; so that, if their government were destroyed by war or revolution, they would still hold firmly together.[5]

Mill and Sidgwick clarify a vital fact that is obscured by Rand's account: the forming of a nation is, above all, a function of a people's consciousness and will. In forming a nation, it is not sufficient that a people reside together under the same government in the same territory.

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[3]Ayn Rand, "Don't Let It Go," in *Philosophy: Who Needs It* (New York: Signet, 1984), p. 205.

[4]John Stuart Mill, "Considerations on Representative Government," in *On Liberty and Other Essays*, ed. J. Gray (Oxford: Oxford University Press, 1991), p. 427.

[5]Henry Sidgwick, *Elements of Politics* (London: Macmillan, 1891), p. 214.

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In addition, they have to *want* to live together in such fashion. Further, this desire alone might not be sufficient to form a nation from a group of people residing together in a territory under no governance but their own or their representative's. Beyond having the desire and opportunity to live as one, a people must, to be a nation, also share sufficient mutual affinity in order to succeed in this endeavour, should they seek to do so.

William McDougall, in *The Group Mind*,[6] his ground-breaking 1920 social psychology classic, offered guidance on how much mutual affinity a people needs in order to be a nation. McDougall contended that no fewer than seven separate conditions must be satisfied so that people could enjoy sufficient mutual affinity to live together harmoniously in a territory under the same government, should they endeavour to do so. Without satisfying these seven conditions, a people cannot be considered a genuine nation.

First, they must possess what McDougall terms a certain degree of *mental homogeneity*.[7] According to McDougall, this similarity of outlook and sensibility can result not just from a people sharing a common culture and physical environment, but also from their being of the same race. Typically, in McDougall's view, all such mental homogeneity as distinguishes one nationality from another derives in part from both sources, with only the degree of predominance of each varying from nation to nation.

Second, to live together harmoniously, a people must enjoy *freedom of communication.*

> Without . . . freedom of communication, the various parts of the nation cannot become adequately conscious of one another; . . . The idea of the whole must remain very rudimentary in the minds of the individuals; each part of the whole remains ignorant of many other parts, and there can be no vivid consciousness of a common welfare and a common purpose. . . . [M]ore important still, there can be none of that massive influence of the whole upon each of the units which is the essence of collective mental life.[8]

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[6]William McDougall, *The Group Mind* (Cambridge: Cambridge University Press, 1920). Despite its off-putting and misleading title, this work remains one of the best, albeit neglected, works on the subject of nationalism, and one that repays close study by classical liberals and libertarians alike.

[7]McDougall, *The Group Mind*, p. 107.

[8]McDougall, *The Group Mind*, p. 132.

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Included in the means of communication which facilitate free and reciprocal communication among a people who reside in any territory larger than the city-states of antiquity are the press, radio, telephone, and television, as well as such mass transportation systems as railroads, cars, and airplanes. However, the prime necessary condition for a people to communicate with each other is fluency in the same language.

A third condition of a people's being able to live harmoniously together is their jointly possessing the capacity to produce *national leaders*, "personalities of exceptional powers who . . . play the part of leaders."[9]

Fourth, there must have been, on occasion at least, a *common well-defined purpose* "present to, and dominant in, the minds of all individuals."[10] One such occasion is the need for concerted action on the part of a people to stave off a threat to their survival or freedom posed by the prospect of their imminent invasion or conquest by a foreign power. War is one, but not the only, such occasion for common purpose.

A fifth condition of a people being able to live together harmoniously is their enjoying a sufficient degree of what McDougall terms *material and formal continuity*.[11] By "material continuity," McDougall means a continuous period of residence in the same territory. By "formal continuity," he means the stability and longevity of the major public institutions which structure their lives. Such continuity is said to be an "essential presupposition of all the other main conditions. . . . On it . . . depends the strengths of custom and tradition and, to a very great extent, the strength of national sentiment."[12]

Sixth, a people must also possess some *national self-consciousness*, that is, some awareness of themselves as a distinct people. "Only in so far as the idea of the people or nation as a whole is present to the consciousness of individuals and determines their actions . . . [has] a nation in the proper sense of the word existed."[13]

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[9]McDougall, *The Group Mind*, p. 135.

[10]McDougall, *The Group Mind*, p. 142.

[11]McDougall, *The Group Mind*, p. 145.

[12]McDougall, *The Group Mind*, p. 145.

[13]McDougall, *The Group Mind*, p. 158.

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Finally, a people must feel some sentiment of love or devotion toward that people they consider themselves to be. McDougall terms this sentiment *patriotism*,[14] which may be considered the wellspring from which all nationalist sentiment and aspiration ultimately derives.

Main Contentions

With these preliminaries in place, we may now consider the degree of compatibility between nationalism and liberalism. I intend to answer this question by way of advancing and defending the following three theses.

The first thesis is that, historically speaking, far from being inherently antagonistic to or subversive of classical-liberal ideals and values, nationalism was a *sine qua non* of the initial emergence and realisation of liberal values and ideals.

Second, the same varieties of nationalism that were historically instrumental in bringing about the birth and partial realisation of classical-liberal ideals and values remain a *sine qua non* of their continued and future espousal and realisation.

Third, at present, the greatest threat facing classical-liberal ideals and values is not a hostile foreign power threatening those nation-states in which these ideals first emerged and in which, to date, they have been most fully realised institutionally. Rather, it comes from within these states, where it assumes the form of powerful political coalitions determined to undermine and ultimately destroy the citizens' sense of common nationality by replacing it with a heightened sense of their particularity and diversity vis-à-vis each other and which, unless checked, will lead to the disintegration of these nations into a mass of contending minorities.

I shall now attempt to argue briefly for each thesis before concluding by considering and replying to objections I anticipate that classical liberals and libertarians will raise against them.

Nationalism as a Condition for the Emergence of Liberalism

Thesis 1: Far from being inherently antagonistic to or subversive of

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[14]McDougall, *The Group Mind*, p. 164.

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classical-liberal ideals and values, nationalism was, historically, a sine qua non *of their initial formulation and partial realisation.*

In her monumental study tracing the development of national self-consciousness and nationalist sentiment in the five leading nations of the world, Liah Greenfeld has shown in great detail and with enormous perspicacity how classical-liberal ideals first emerged parallel to and inextricably interwoven with national self-consciousness and nationalist aspiration in sixteenth-century England, achieving partial realisation there in the following century. Liberal ideals and national awareness emerged in tandem in the wake of political and religious reforms carried out by Henry VIII as a result of his break from Rome. According to Greenfeld:

> In the sixteenth century, England underwent a profound social transformation. . . . [F]irst, . . . [came] the extinction of the old nobility . . . complete[d] by 1540. . . . Simultaneously with the destruction of the old nobility, a stratum destined to replace it appeared.
>
> The new—Henrician—aristocracy . . . was predominantly an official elite. . . . The majority . . . were people of modest birth . . . recruited from the minor gentry or even humbler strata. The aristocracy . . . became open to talent. . . . A fundamental transformation of this kind . . . required a rationalisation and justification. . . .
>
> *It is at this juncture . . . that nationalism was born.* The idea of the nation—of the people as an elite—appealed to the new aristocracy. . . . In a way, nationality made every Englishman a nobleman. . . .
>
> By the 1530s . . . entering the discourse . . . [was the] concept of England as a separate entity and as a polity which was not simply a royal patrimony but a commonwealth. . . .
>
> [A]lso under Henry . . . another factor appeared, the implications of which for both the development and the nature of English nationalism were enormous. . . . Henry's break from Rome . . . opened the doors to Protestantism, perhaps the most significant among the factors that furthered the development of . . . English national consciousness. . . . The Protestant insistence on the priesthood of all believers reinforced the rationalist individualism in which the idea of the nation in England was grounded. . . . The reading of the Bible planted and nurtured among the common people in England a novel sense of human—individual—dignity, which was instantly to become one of their dearest possessions. . . .

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> For the newly acquired sense of dignity made masses of Englishmen a part of that small circle of new aristocrats and clergymen . . . who were already enchanted by the idea of the people as an elite, and of themselves as members of such a people.[15]

The Protestant English thus formed an image of themselves as a divinely chosen elite. This image gave to them, or, at least, to the relevant sections who found representation in the House of Commons, the conceptual resources as well as the motivation to embark, in the century after Henry, on a protracted struggle against their hereditary rulers. This struggle culminated in the Glorious Revolution of 1688, which saw an elected parliament achieve a decisive victory over a hereditary monarch who tried to lay claim to absolute sovereignty in his own person.

As part of the constitutional settlement in which the Crown passed, via parliamentary decision, from the Catholic Stuart line to the Protestant William and Mary of Orange, and subsequently to the Hanoverians, many of the values and practices which liberals hold dear became enshrined within the English Constitution—albeit, at first, in only a limited and qualified form. These liberties and practices include liberty of religious worship, equality before the law, freedom of the press, and parliamentary representation.

Well before the English had acquired even this highly qualified religious liberty, but after their desire for it had awakened during the sixteenth century, 60,000 English Puritans, impatient for such freedom, set sail for the new world to create there a New England where they would be able to enjoy the freedom of worship denied them at home. Those Englishmen and their descendants formed the nucleus of that second great liberal people who, when awakened to their own nationhood in the eighteenth century, achieved a still greater realisation of classical-liberal ideals on the far side of the Atlantic than the Glorious Revolution had accomplished in England.

The Puritan settlers brought with them to America the same love of liberty which had become a distinctive part of the English national character. They made this love of liberty as equally a distinctive feature of the American nation as it had become of the English nation. As

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[15]Liah Greenfeld, *Nationalism: Five Roads to Modernity* (Cambridge, Mass.: Harvard University Press, 1992), pp. 47–54, emphasis in original.

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Greenfeld remarks, "it was through the Puritan mediation that love of liberty became the distinguishing characteristic of America."[16]

Eventually, as in England, this love of liberty among the American settlers became secularised and generalised. Greenfeld writes:

> As in England, godliness in the colonies gradually acquired a secular meaning, which by the eighteenth century became dominant and, even more than in England, expressed itself in devotion to the triad—liberty, equality, and reason. . . . American society was exemplary in its devotion to the English ideals: it turned them into reality. . . . The sense of exemplary devotion to and implementation of English values was shared by the colonists everywhere and became a central element in the local American identity.[17]

Devotion to this same liberty led the American colonists in the eighteenth century to break away from their mother country. By establishing their own independent republic, they hoped to enjoy the self-governance which the English had long regarded as their birthright, but which their mother country had denied the colonists. Greenfeld claims that the most important factor leading to American independence was

> the fact that Americans had a national identity from the very start and that was the English national identity. . . . The English idea of the nation implied the symbolic elevation of the common people to the position of an elite, which in theory made every individual the sole legitimate representative of his own interests and an equal participant in the political life of the collective.[18]

In the course of defending the moral legitimacy of the American Revolution, Thomas Paine extended the right to liberty to all mankind, inviting lovers of liberty everywhere to join the American nation.

> Europe, and not England, is the parent country of America. This new world has been the asylum for the persecuted lovers of civil and religious liberty from *every part* of Europe. . . . We claim brotherhood with every European Christian, and triumph in the generosity of the sentiment.[19]

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[16]Greenfeld, *Nationalism*, p. 407.

[17]Greenfeld, *Nationalism*, pp. 408–9.

[18]Greenfeld, *Nationalism*, p. 420.

[19]Thomas Paine, quoted in Greenfeld, *Nationalism*, p. 420.

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Today, we might be less than fully impressed by the liberality of sentiment here expressed, but its general liberal tenor remains clear. As Greenfeld put it, the American Revolution brought into the world the idea that "self-government is mankind's birthright, not an English liberty."[20]

NATIONALISM IS STILL A *SINE QUA NON* OF LIBERALISM

Thesis 2: The same varieties of nationalism that were historically instrumental in bringing about the birth and partial realisation of classical-liberal ideals and values remain a sine qua non *of their continued and future espousal and realisation.*

Despite spreading both eastward and westward from England, classical-liberal ideals and values never managed to take root in political thought and practice anywhere as firmly as in England and the United States. As that great student of nationalism, Hans Kohn, once observed,

> Modern nationalism first took hold in England in the seventeenth century and in Anglo-America in the eighteenth century. . . . [It] respected, and was based upon, the individual liberties and self-government characteristic of these nations. The rise of nationalism in the French Revolution was different. The absolutist and centralised French monarchy had set the example for continental Europe in the seventeenth and eighteenth centuries; the nationalism of the French people continued this form and set the model for the centralised European nation-state of the nineteenth century. The Napoleonic wars carried the aggressiveness of the new nationalism to the four corners of Europe.[21]

It remains true that England and America, more so than other nations, have more closely approached the realisation of classical-liberal ideals and values. This is so despite the severe erosion of the liberal credential in both countries during the twentieth century. This erosion was, of course, the result of their respective flirtations with collectivist ideologies and policies, especially those connected with

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[20]Greenfeld, *Nationalism*, p. 420.

[21]Hans Kohn, "Nationalism," in *Ideologies of Politics*, ed. A. De Crespigny and J. Cronin (London: Oxford University Press), p. 156.

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social democracy and the welfare state. However, given the historic embeddedness of liberal ideals in the political constitutions and national imaginations of these two nations, the best historical prospects for liberty still remain with them, and still depend on their continued survival in at least as liberal a form as they are in.

Classical liberals, therefore, should not write nationalism off as an attitude that, in all its forms, is always and everywhere uncongenial to their own values and ideals. After all, and notwithstanding the collapse of communism, the two great nation-states of Britain and the U.S.—states in which classical-liberal values have thus far been most fully, if only incompletely and imperfectly, realised—are but islands of relative liberty in a vast ocean of far greater illiberalism.

No less a classical-liberal thinker than Ludwig von Mises claims that the best historical prospects for the eventual realisation of liberal ideals and values lie in the continued survival of these two states in a form that depends on each retaining its historic national identity. During the closing stages of the Second World War, after allied victory had become assured, Mises issued this stark warning:

> It would be a fateful mistake to assume that a return to the policies of liberalism abandoned by the civilised nations some decades ago could cure the [present] evils and open the way towards peaceful co-operation of nations and toward prosperity. . . . [T]he years of antagonism and conflict have left a deep impression on human mentality, which cannot be easily eradicated. They have marked the souls of men, they have disintegrated the spirit of human cooperation, and have engendered hatreds *which can vanish only in centuries.*
>
> Under present conditions, the adoption of a policy of outright *laissez faire* and *laissez passer* on the part of the civilised nations of the West would be equivalent to an unconditional surrender to the totalitarian nations.
>
> Take, for instance, the case of migration barriers. Unrestrictedly opening the doors of the Americas, of Australia, and of Western Europe to immigrants would today be the equivalent to opening the doors to the vanguards of the armies of Germany, Italy, and Japan. . . .
>
> [T]he most that can be expected for the immediate future is the separation of the world into two sections: a liberal, democratic, and capitalist West with about one quarter of the total population, and a militarist and totalitarian

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> East embracing the greater part of the earth's surface and population.[22]

Mises feared a massive immigration into the liberal democracies by peoples of vastly different ethnicity, culture, and outlook. Such immigration, he believed, could radically destabilize and ultimately imperil the political viability of such democracies. These immigrants, given the numbers in which he supposed they would enter, if able, would be not only unassimilated but unassimilable.

Without strict immigration controls, Mises thought, host populations would rapidly become national minorities in their own lands. As such, the hosts would become vulnerable to forms of oppression and persecution at the hands of new arrivals. Being unassimilated, after all, the new arrivals would not be indisposed to turning their own population advantage into the political advantage that their numeric superiority might provide them under conditions of representative democracy.

In an earlier work, Mises had identified as the most important threat facing the preservation of world peace the fear these two nations felt of being swamped by immigrants of remote outlook and nationality. He wrote:

> In the absence of any migration barriers whatsoever, vast hordes of immigrants . . . would, it is maintained, . . . inundate Australia and America . . . in such great numbers that it would no longer be possible to count on their assimilation. . . . If, in the past, immigrants to America soon adopted the English language and American ways and customs, this was, in part, due to the fact that they did not come over all at once in such great numbers. . . . This . . . would now change, and there is real danger that the ascendancy—or more correctly, the exclusive dominion—of the Anglo-Saxons in the United States would be destroyed. This is especially to be feared in the case of heavy immigration on the part of the Mongolian peoples of Asia.[23]

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[22]Ludwig von Mises, *Omnipotent Government: The Rise of the Total State and Total War* (Spring Mills, Penn.: Libertarian Press, 1969), pp. 10–11, emphasis added.

[23]Ludwig von Mises, *Liberalism in the Classical Tradition* (Irvington, N.Y.: Foundation for Economic Education, 1985), pp. 141–42.

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Having identified and articulated this fear, Mises went on to endorse it as reasonable. He wrote:

> it cannot be denied that these fears are justified. Because of the enormous power that today stands at the command of the state, a national minority must expect the worst from a majority of a different nationality. As long as the state is granted the vast powers which it has today and which public opinion considers to be its right,[24] the thought of having to live in a state whose government is in the hands of members of a foreign nationality is positively terrifying. It is frightful to live in a state in which at every turn one is exposed to persecution—masquerading under the guise of justice—by a ruling majority. It is dreadful to be handicapped even as a child in school on account of one's nationality and to be in the wrong before every judicial and administrative authority because one belongs to a national minority.[25]

Mises's ultimate long-term solution to this problem was not the strict immigration controls which he later advocated as a temporary expedient after the War. Such barriers to labour mobility do nothing to reduce the gap in living standards between rich and poor—a gap he considered the root of the envy and rancour felt by the latter toward the former which would render unrestricted immigration so potentially dangerous. What Mises proposed as the only viable solution to the problem of the discrepancy between rich and poor nations was the universal adoption of the classical-liberal agenda of minimal government:

> It is clear that no solution of the problem of immigration is possible if one adheres to the ideal of the interventionist state, which meddles in every field of human activity. Only the adoption of the liberal program could make the problem of immigration, which today seems insoluble, completely disappear.[26]

It was with the problem of relations between rich and poor firmly in mind that, toward the end of the book, he declared that

> The greatest ideological question that mankind has ever faced . . . is the question of whether we shall succeed in

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[24]Bear in mind that Mises is commenting on the reasonableness of public opinion relative to the size of government as it was in 1927, not 1947 or 1997.

[25]Mises, *Liberalism*, pp. 141–42.

[26]Mises, *Liberalism*, p. 142.

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> creating throughout the world a frame of mind . . . [that] can be nothing less than the unqualified, unconditional acceptance of liberalism. Liberal thinking must permeate all nations, liberal principles must pervade all political institutions, if the prerequisites of peace are to be created and the causes of war eliminated.[27]

In Mises's view, for the U.S. or U.K. to remove all immigration barriers, as certain libertarians have recently advocated,[28] even after such governments had first been minimized, would still not be enough to prevent the danger he foresaw attendant upon mass immigration into these countries by peoples of different culture and ethnicity from that of majority. According to Mises, even policing and the judicial process are capable of being turned against minorities by members of majorities who perceive the minorities as alien and foreign. As Mises put it,

> Large areas of the world have been settled, not by the members of just one nationality, one race, or one religion, but by a motley mixture of many peoples. As a result of the migratory movements that necessarily follow shifts in the location of production, more new territories are continually being confronted with the problem of a mixed population. . . .
>
> To be a member of a national minority always means that one is a second class citizen. . . . The citizen who speaks a foreign tongue . . . must obey the law; yet he has a feeling that he is excluded from effective participation in shaping the will of the legislative authority or at least that he is not allowed to cooperate in shaping it to the same extent as those whose native tongue is that of the ruling majority. And when he appears before a magistrate or any administrative official as a party to a suit or petition, he stands before men whose political thought is foreign to him because it developed under different ideological influences. [T]he very fact that the members of the minority are required . . . to make use of a language foreign to them already handicaps them, seriously in many respects . . . when . . . on trial. . . . At every turn, the member of a national minority is made to feel that he lives among strangers and that he is, even if the letter of the law denies it, a second-class citizen. . . .

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[27]Mises, *Liberalism*, p. 150.

[28]See, e.g., Julian L. Simon, *Population Matters* (New Brunswick, N.J.: Transaction, 1990).

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> All these disadvantages are felt to be very oppressive even in a state with a liberal constitution in which the activity of the government is restricted to the protection of the life and property of the citizens. But they become intolerable in an interventionist or a socialist state.[29]

What would, and should, become of nationalist sentiment and immigration barriers in a world in which all inhabitants share classical-liberal ideals and values can doubtless be the subject of fruitful discussion, and surely has a part to play in classical-liberal debate. However, the answer to this question should not determine what attitude classical liberals should adopt toward nationalism in an only partially liberal world. Such a decision process would be analogous to concluding that, since individual states in a liberal world would have no need for a nuclear deterrent, individual states also have no need for one in a deeply illiberal world in which many states already possess such weapons.

HOSTILITY TO NATIONALISM AS THE CURRENT THREAT TO LIBERALISM

Thesis 3: At present, the greatest threat facing classical-liberal ideals and values is not a hostile foreign power threatening those nation-states in which these ideals first emerged and in which, to date, they have been most fully realised institutionally. Rather, it comes from within these states, where it assumes the form of powerful political coalitions determined to undermine and ultimately destroy the citizens' sense of common nationality. Such coalitions seek to replace it with a heightened sense of their particularity and diversity vis-à-vis each other and which, unless checked, will lead to the disintegration of these nations into a mass of contending minorities.

We might term the current threat facing liberal regimes *liberal death wish number two,* the first having been the attempt to make themselves socialist, a danger which seems to have abated since the collapse of communism. The political tendency currently threatening liberalism often goes today under the name "multi-culturalism." In the case of Britain, *liberal death wish number two* extends beyond the encouragement and cultivation of separate cultural identities for the various ethnic and cultural groups that make up its citizenry. It

[29]Mises, *Liberalism*, pp. 117–20.

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includes calls for the dissolution of the body politic itself into the several historic principalities and regions from which it was formed. In addition, it calls for the United Kingdom to relinquish its status as a sovereign state through becoming part of the emerging federal European Union, the illiberal credentials of which become more apparent every day.[30]

Many commentators have pointed out that the implementation of the programme favoured by multi-culturalists in the U.K. and U.S., from encouraging separate schooling to affirmative action in the workplace, would not lead to any greater autonomy for the minorities on whose behalf it is ostensibly pursued.[31] Indeed, the accentuation of ethnic difference at the expense of common culture and common nationality threatens the liberal character of each nation.

Rather, these policies would lead to a fragmentation and dissolution of the civic bonds that unite the diverse constituent peoples who comprise these two great nations. In the absence of these common bonds, civility would rapidly break down, and the diverse ethnic groups would no longer be able to live together harmoniously under the same government. In short, the policies of cultural autonomy favoured by many multi-culturalists would lead not to the pluralist utopia which their starry-eyed proponents promise, but, more likely, to British and American equivalents of the burning streets of Sarajevo.

CONCLUSION

Classical liberals should neither ignore nor underestimate the value to their cause of American and British nationalism. The political order to which classical liberals aspire—worldwide minimal government—has no chance of seeing the light of day unless the populaces of Britain and the United States remain as liberal as they have long been. The populace of neither nation-state can do so unless each preserves its own unique and distinct national identity and status. This

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[30]For an elaboration of this thesis, see David Conway, "The Future of Liberty in the European Union," *The European Journal* 8, no. 6 (May 2001).

[31]See, e.g., Arthur M. Schlesinger, *The Disuniting of America: Reflections on a Multicultural Society* (New York: W.W. Norton, 1992); and S.P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (London: Touchstone Books, 1996).

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will be a hard saying for some, since, to many, it will seem overly restrictive, and, moreover, historically false.

I anticipate that some will object that the U.S. and the present-day U.K. are not only not today's most liberal societies, judged in classical-liberal terms, but also, in terms of the ethnic composition of the citizenry of each, are already manifestly multi-national or multi-cultural or multi-ethnic. Neither the U.S. nor the U.K., however, can be cited as examples of a stable and robust multi-national liberal polity; thus, their viability cannot serve to counter-instantiate the claim that each needs to preserve its national homogeneity to maintain its viability.

This is so for two reasons. First, neither state is genuinely multi-national in the relevant sense. Second, to the extent that each has become multi-national today, so is its liberal character under severe threat. It is imperative to realise that, notwithstanding the rhetoric of multi-culturalists and devolutionists, neither state has been anything but mono-cultural since its inception, and the viability of each has rested on this fact. In fact, certain cultural hegemonic traits—such as the use of English as the standard language in each country—are not optional extras that can be safely discarded. Rather, the loss of such cultural hegemony is, perhaps, the greatest threat that would accompany any expansion of liberalism in either nation.

There is a danger that even classical liberals may be led astray here by misinterpreting the scope of certain remarks made by Mises about what is appropriate liberal policy for polyglot territories, and coming to suppose his prescriptions apply in the case of the U.S. and the U.K., given their current multi-cultural composition. In writing about what obtains under polyglot conditions, Mises claimed that the state should withdraw completely in terms of what it demands of its citizens vis-à-vis the linguistic competence of their children. Specifically, the state should not insist on any one language being official, nor even insist on schooling being compulsory. Classical liberals might suppose that this policy should also carry over to present-day U.S. and U.K. But the conditions which obtained in the former Hapsburg Empire, which was where Mises had in mind when making this proposal, do not obtain in Britain and America, and what is true of it does not apply to them.

In fact, quite the opposite holds. In the case of both the U.K. and U.S., the viability of their liberal institutions reduces in such proportion as the state encourages and supports cultural and linguistic diversity.

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John Stuart Mill, whose views on this subject are as valid today as when he advanced them more than one hundred years ago, explains why:

> Free institutions are next to impossible in a country made up of different nationalities. Among a people without fellow-feeling, the united public opinion, necessary to the working of representative government, cannot exist. The influences which form opinions and decide political acts, are different in the different sections of the country. An altogether different set of leaders have the confidence of one part of the country and of the other.
>
> The same books, newspapers, pamphlets, speeches, do not reach them. One section does not know what opinions, or what instigations, are circulating in another. The same incidents, the same acts, the same system of government, affect them in different ways; and each fears more injury to itself from other nationalities, than from the common arbiter, the State. Their mutual antipathies are generally much stronger than jealousy of the government. . . .
>
> For [this] reason, it is in general a necessary condition of free institutions, that the boundaries of government should coincide in the main with those of nationalities.[32]

"But"—I can anticipate the objection—"are not minorities hampered or oppressed by this demand for national homogeneity? How can such a demand be liberal?" The answer is: minorities are not hampered or oppressed by such a demand, provided—but only provided—that the governments of the states in which they reside remain minimal in function, or, at least, are strictly limited. In proportion as government becomes more than minimal, so what might be involved by its demand for national homogeneity becomes oppressive of minorities. The more extensive government is, the greater the scope for political power to be used by ethnic majorities against minorities.

This is the great teaching of Mises's study of nationalism. It is not that liberal polities should not aspire after and seek to maintain national homogeneity. It is, rather, that where there are substantial minorities within a territory, to be liberal, government should and must become minimal. As Mises observed,

> If the administrative authorities have the right to intervene everywhere according to their discretion, if the latitude granted to judges and officials in reaching their decisions

[32]Mill, "Considerations on Representative Government," pp. 428–30.

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> is so wide as to leave room for the operation of political prejudices, then a member of a national minority finds himself delivered over to arbitrary judgement and oppression on the part of the public functionaries belonging to the ruling majority.[33]

It is not illiberal for Britain and the United States to keep English the official national language, and to demand of parents enjoying permanent residence or citizenship within these countries to ensure that children raised there be fluent in English. It would be illiberal for a state to make similar demands which favoured one natural language in territories which were genuinely polyglot, such as the former Austro-Hungarian Empire, which neither Britain nor the United States has ever been.

In genuinely—but only genuinely—polyglot territories, it would be illiberal for the state to make such a demand of its citizens. To do so would alienate children from their parents, the children being instructed in a language different from that their parents speak. As Mises also observed,

> [I]n those extensive areas in which peoples speaking different languages live together side by side intermingled and in polyglot confusion, . . . [t]he question of which language is to be made the basis of instruction assumes crucial importance. A decision one way or the other can, over the years, determine the nationality of a whole area. The school can alienate children from the nationality to which their parents belong and be used as a means of oppressing whole nationalities. . . . In all areas of mixed nationality, the school is a political prize of the highest importance. It cannot be deprived of its political character as long as it remains a public . . . institution.[34]

However, those who choose to emigrate to and have been admitted into Britain and America have no right to be granted citizenship, or even permanent residence, while refusing to acquire for themselves, or ensure that their children acquire, the wherewithal to be of that nation. Acquiring fluency in the native tongue is the minimal condition of being able to be such. This is what is so potentially dangerous and divisive about the current multi-cultural movement in both Britain and the United States. In seeking to disunite the citizenry of

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[33]Mises, *Liberalism*, p. 120.

[34]Mises, *Liberalism*, p. 116.

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these two nations, through fostering or even permitting linguistic apartheid, multi-culturalism is sowing the seeds of future disunion and anarchy.[35]

My overall conclusion, therefore, is that nationalism of the British and American varieties, far from being incompatible with or hostile to liberalism, is the best friend of liberty and the best guarantor of its future survival. This being so, citizens of each who are friends of liberty should affirm and be proud of their liberal and national traditions. They should seek to reverse the terrible decline in national self-esteem that has recently occurred in both nations through the ascendancy that has been gained in each of an ideology designed to undermine national pride and self-esteem out of a misbegotten concern for supposedly disadvantaged minorities.

Lovers of liberty in both nations should be aware and proud of their own liberal national heritage and of the common source from which both spring. So struck was Mises by the affinity between the American and English peoples that, in 1919, he went so far as to describe them as forming "a single nation . . . bound by a national bond that will show its binding force in days of great political crisis."[36]

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[35]Some might wonder whether the cause of liberty is not best served today by the U.S. and U.K. taking the path of ever-greater cultural and political regional autonomy, eventually issuing in the dissolution of these political unions through secession from them of whichever constituent states or confederations chose, through referenda, to secede. My view is that the cause of liberty remains unaffected one way or the other, no matter how zealously cultural or even political regional autonomy might be pursued in these political confederations. This is provided that the manner of its pursuit and the exercise of any such autonomy acquired remains, as is conceivable but unlikely, consistent with upholding the civil and political rights of any dissenting cultural minorities resident within those regions.

However, it is highly anachronistic to suppose that secession today in either state is anywhere desired by any regional majority, or, if, say, as in Northern Ireland, it was, it is capable of coming about without a form of "ethnic cleansing" that renders it unconscionable to classical liberals. This issue is as huge as it is important, and I cannot here give it the extended attention it merits. For an interesting set of discussions on the subject, many of which express views different from my own, see David Gordon, ed., *Secession, State, & Liberty* (New Brunswick, N.J.: Transaction, 1998).

[36]Ludwig von Mises, *Nation, State, and Economy* (New York: New York University Press, 1983), p. 19.

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Accordingly, I shall conclude by articulating a sentiment which I like to think he would have been glad to endorse were he alive today. Long may these two great nations continue to be divided by their common language but united by their distinct, but equally liberal, nationalities.

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EUROPEAN UNIFICATION AS THE NEW FRONTIER OF COLLECTIVISM: THE CASE FOR COMPETITIVE FEDERALISM AND POLYCENTRIC LAW

Carlo Lottieri*

> Frankfurt, Bremen, Hamburg, Luebeck are large and brilliant, and their impact on the prosperity of Germany is incalculable. Yet, would they remain what they are if they were to lose their independence and be incorporated?" – Johann Wolfgang von Goethe [1]

> From the extent of our country, its diversified interests, different pursuits, and different habits, it is too obvious for argument that a single consolidated Government would be wholly inadequate to watch over and protect its interests; and every friend of our free institutions should be always prepared to maintain unimpaired and in full vigor the rights and sovereignty of the states and to confine the action of the General Government strictly to the sphere of its appropriate duties." – Andrew Jackson [2]

> One essential of a free government is that it rests wholly on voluntary support. And one certain proof that a

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[1]Johann Wolfgang von Goethe, *Gespräche mit Eckermann*, quoted in Hans-Hermann Hoppe, "What Made Germany Great," *Rothbard–Rockwell Report* 10, no. 9 (September 1999), p. 16.

[2]Andrew Jackson, *A Political Testament,* in *Social Theories of Jacksonian Democracy: Representative Writings of the Period*, ed. Joseph L. Blau (Indianapolis, Ind.: Bobbs-Merrill, 1954), p. 9.

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> government is not free, is that it coerces more or less persons to support it, against their will. – Lysander Spooner [3]

In Europe, one of the most important contemporary debates concerns unification and the project to create a centralized state with a single currency, a democratic parliament, and a monopolistic government. In this context, the current crisis of the European Monetary Unit (EMU) becomes a good argument in favor of an even-more-accelerated path toward the transfer of powers from the old nation-states to Brussels and Strasbourg. According to many economists and political scientists, the poor performance of the European single currency is the consequence of a lack of institutional unity. Hoping for a reversal in the declining power of Western socialist ideals, they call for more political centralization and economic planning. These discussions are plagued by certain superstitions, so, in the first part of this article, I will try to show the irrationality of unifying this continent, as well as how this plan is an absurd treason of the best European liberal traditions.

Europeans seem to have accepted the project of a "European democracy" without analyzing its implications. They not only underestimate historical and extraordinary differences among European societies, they also ignore the benefits of competition between independent political structures and seem totally unaware of the distributive consequences of a massive democracy.[4] They seem to ignore their history, particularly the medieval roots of their historical success, which would have been impossible if the European continent had ever been unified by a single political power. In the second part of my analysis, I will try to point out the advantages of a true federal alternative, based on institutional competition and communities by consent.[5] Federalism, correctly understood, is firmly in the

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[3]Lysander Spooner, *No Treason, No. 2*, in *The Lysander Spooner Reader* (San Francisco: Fox & Wilkes, 1992), p. 66.

[4]For a strong critique of democracy from a libertarian point of view, see Hans-Hermann Hoppe, *Democracy—The God That Failed: The Economics and Politics of Monarchy, Democracy, and Natural Order* (New Brunswick, N.J.: Transaction, 2001).

[5]This expression is a free borrowing from the Rothbardian idea of "nations by consent"; see Murray N. Rothbard, "Nations by Consent: Decomposing the Nation-State," *Journal of Libertarian Studies* 11, no. 1 (Fall 1994), pp. 1–10.

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tradition of libertarianism. In the logic of radical and authentic federalism, political communities are "federations of individuals," and these institutions develop new voluntary relationships establishing "federations of federations." Thus, the term and concept of a "federal state" is a contradiction in terms, because a state always suggests the notion of a permanent chain of command incompatible with federalism and its logic of free agreements. In fact, federalism is a set of voluntary relations working within communities as well as among individuals.

American history offers us a tragic example of the failure to comprehend the true nature of federalism: the American Civil War. Political theorist John C. Calhoun considered the Union to be a federation —the "United States" *were* several states joined in a free compact. For this reason, he defended the Southern point of view. However, heirs of the Hamiltonian tradition, including President Lincoln, were persuaded that the "United States" *was* a single state: a permanent and unified democracy. The bloody struggle between Northerners and Southerners from 1861 to 1865 was the dramatic consequence of the absurd effort to link the conflicting notions of "state" and "federation."[6]

Europeans have an opportunity to make good use of the lessons from this tragic American experience. In other words, Europeans must avoid the consequences of a vague definition of the federal compact. The main task is to build federal institutions and, for this reason, to coordinate a strong resistance against rising centralism.[7]

To pursue this objective, European peoples must elaborate a new vision of Europe—a vision based on property rights, individual liberty, the free market, local autonomies, federalism, and the right of secession. This is the glorious past of the Old Continent, and this can be—while the age that saw the triumph of the modern state and totalitarian ideologies seems to be fading—its future.

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[6]For an interesting analysis of the peculiarity of the Jeffersonian tradition with reference to differences between European and American ideas of sovereignty, see Luigi M. Bassani, "Jefferson, Calhoun, and States' Rights: The Uneasy Europeanization of American Politics," *Telos* 114 (Winter 1999), pp. 132–54.

[7]An interesting analysis of the transition from the Articles of Confederation (1781–1789) to the federal Constitution is in Peter A. Aranson, "The European Economic Community: Lessons from America," *Journal des Économistes et des Études Humaines* 1, no. 4 (December 1990), pp. 473–96.

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FOUR SUPERSTITIONS ENTERTAINED BY THE DREAMERS OF A CENTRALIZED SUPERSTATE

Superstition # 1: Individual liberty and juridical polycentrism cause tensions and, ultimately, wars.

For the last few centuries, European countries have engaged in many wars, chiefly caused by imperialism and statist ideologies. Yet, these tragedies are often explained with recourse to the notorious Hobbesian argument. For many contemporary intellectuals and politicians, European peoples were enemies in the past because they were separated by the frontiers of independent states. Consequently, they can achieve a peaceful future only if they build common political institutions. In this philosophy, European unification is only one step in the long path toward the political unification of the whole world.

In the seventeenth century, Thomas Hobbes, frightened by religious divisions, conceived Leviathan as the only possible apparatus capable of imposing peace. Individuals lost their freedoms through the social contract, and received peace and life in return.[8] The state affirmed itself as the condition for the avoidance of chaos, wars, and anarchy. Its first justification was the individual's fear of being killed by a fellow man. This interpretation remains well accepted, with the implicit idea that the state can be a "neutral" power, having no ideology of its own, and, thus, can be competent to nullify any religious, social, or ideological conflict.

However, these arguments are not consistent with the facts. The religion wars faded away only when a new sort of religion (*statist* ideology) imposed its power over civil society and traditional faiths. At the beginning of modern history, secular power became "sovereign," losing its moral bounds after such onslaughts as Marsilius of Padua's *Defensor Pacis* and Machiavelli's *Il Principe*.[9] But the success of

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[8]Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1996). Some modern classical liberals accept Hobbesian utilitarian analysis of the necessity to move from the state of nature to an organized and monopolist government. See, e.g., James M. Buchanan, *The Limits of Liberty: Between Anarchy and Leviathan* (Chicago: Chicago University Press, 1975); and Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, Mass.: Harvard University Press, 1985).

[9]Marsilius of Padua, *The Defender of Peace*, trans. Alan Gewirth (New York: Columbia University Press, 1956); and Niccolò Machiavelli, *The Prince*, trans. George Bull (London: Penguin Books, 1961).

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this kind of "peace" marks the beginning of a more important statist aggression to free confessions. It was also the precondition for implementing contemporary totalitarian regimes.[10]

The Hobbesian notion that a *spontaneous* order (such as a free market of rules, laws, and institutions) is a theoretical impossibility must be recognized as the most important cultural factor. It is this idea that now pushes continental leaders toward the increase of political cohesion and the reduction of economic competition. Yet, there are many arguments against this view, both theoretical and empirical. Concrete experiences demonstrate that men can, and do, create cooperation and harmony in the absence of a legal monopoly.[11]

Besides that, the creation of a European democratic power would reduce competition. For example, if the Italian government might now cut taxes because it fears that capital and firms might want to leave the country (e.g., in order to exploit new opportunities in Germany, France, or the United Kingdom), in a European unified state, even this remote possibility will disappear. In fact, "harmonization" is the catchword most utilized by the militant unificationists.

The global economy is a space of peace and exchanges because, in the market, the relationships in which every actor participates are voluntary. Increasing political unification, however, is a sure way to generate more conflicts, since different peoples in different industries in different regions have different institutions, methods, and techniques. Political unification imposes a "one size fits all" solution on every issue, while, in a world of competition, different solutions will arise in different places.

It is also important to remember that, in Spain or Britain, the persistence of centralist policies (despite the opposition of Basque and Irish secessionists) is a relevant factor in radical conflicts. The present European situation teaches us that it is impossible to unify peoples in a coercive way and, at the same time, pretend to peaceful relationships. A compulsory Union would be the premise for all sorts of tensions.

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[10]In the twentieth century, the persecution of Christians, Jews, Muslims, and Buddhists in every communist and totalitarian regime (as well as in the secular propaganda of many Western democratic societies) has shown the real "religious" nature of the Machiavellian-Hobbesian solution.

[11]See, e.g., Robert Axelrod, *The Evolution of Cooperation* (New York: Basic Books, 1984).

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In addition, the process of European democratization might also signify a more important presence of European armies around the world. The consequence would be a new form of imperialism, and, thus, it would copy the worst things of recent American history.

Superstition # 2: The market requires the state: it is the result of the juridical order created by the political monopoly.

James M. Buchanan is one of the scholars who have most insistently emphasized the necessity to unify Europe. His idea is that classical liberals and libertarians must encourage every effort "to move toward federalist structures in which political authority is divided between levels of government." In Buchanan's theory of federalism, a free-market society needs competition between separate state or provincial units. He remarks that localized politicians and coalitions are less able "to depart significantly from overall efficiency standards in their taxing, spending, and regulatory politics."[12] But he adds that the *exit* option must be guaranteed by the central government, an option which effectively limits the ability of state or provincial governments to exploit citizens.

As a consequence of this analysis, Buchanan says, in the U.S., "effective reform must embody devolution of power from the central government to the states," while in Europe, "reform requires the establishment of a strong but limited central authority, empowered to enforce the openness of the economy, along with the other minimal state functions."[13] Buchanan's underlying thesis is that individual liberty cannot be protected by a simple competition of governments; for this reason, European peoples must accept a monopolistic continental power.

The logic is clear, and Buchanan clarifies his position when he states that accepting the idea "that private and voluntary action can be efficacious over the whole social space (including basic protections to

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[12]James M. Buchanan, "Federalism and Individual Sovereignty," *Cato Journal* 15, nos. 2–3 (Fall/Winter 1996), pp. 259 and 261. For a more complete introduction to the themes of public-choice competitive federalism, see George Brennan and James M. Buchanan, *The Power to Tax: Analytical Foundations of a Fiscal Constitution* (Cambridge: Cambridge University Press, 1980).

[13]Buchanan, "Federalism and Individual Sovereignty," p. 266.

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person, property, and contract)" would represent "a leap backward into the Hobbesian jungle."[14] However, this analysis is weak, because the equation between liberty and chaos is not justified.[15]

One does not have to share libertarian ethical principles to observe that a juridical order emerges even in societies lacking a monopolistic group of rulers. Roman Law, *Lex Mercatoria*, and Common Law are important examples of rules emerging in a social order rather than in a state order. For centuries, and in many different contexts, people lived together in well-defined juridical systems without a common policy fixed by a king or a parliament.[16] As Bruno Leoni pointed out in *Freedom and the Law*, for instance,

> the Romans accepted and applied a concept of certainty of the law that could be described as meaning that the law was never to be subjected to sudden and unpredictable changes. Moreover, the law was never to be submitted, as a rule, to the arbitrary will or to the arbitrary power of any legislative assembly or of any person, including senators or prominent magistrates of the state.[17]

One of the most important lessons of libertarian realism is that the state is not the protector of rights and liberties; rather, it is their worst enemy. Its existence is a continuous aggression against liberty, property, and autonomy. Accordingly, free-market relations exist in Western societies despite the state, rather than because of it.

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[14]Buchanan, "Federalism and Individual Sovereignty," p. 267.

[15]In fact, Buchanan accepts the Hobbesian idea of freedom as "license," while classical liberal and libertarian traditions are closer to the Lockean definition of state of nature: "though this be a state of liberty, yet it is not a state of licence." John Locke, *Two Treatises of Government . . . The Latter is an Essay Concerning the True Original, Extent, and End of Civil Government* (London: Everyman, 1996), § 4, p. 117.

[16]When Bruce Benson presents the Law Merchant, he stresses that "the reciprocity necessary for the recognition of commercial law arose due to the mutual gains generated by exchange." See Bruce Benson, *The Enterprise of Law: Justice Without the State* (San Francisco: Pacific Research Institute for Public Policy, 1990), p. 31. In a similar way, Leoni built his legal theory on the hypothesis that rules are the result of an exchange of claims. The "claim" is the individual act that originates law, as demand and offer are the choices that create prices. See Bruno Leoni, "The Law as Individual Claim," *Archiv für Rechts–und Sozialphilosophie* (1964), pp. 45–58.

[17]Bruno Leoni, *Freedom and the Law* (New York: Van Nostrand, 1961), pp. 84–85.

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Classical liberals and libertarians must become more aware that the roots of our history of freedom lie in the institutional pluralism of the Middle Ages. As Boudewijn Bouckaert wrote,

> polycentric extended orders, such as Medieval Peace of God (1100–1500), do not conform with the Hobbesian intuition about power and order. . . . The Medieval order was an order without a sovereign power in the "modern" sense of the word, i.e., a central power disposing of a monopoly of a coercive power enabling it to rule a whole nation and to act as a conflict-solver of the last resort.[18]

Robert Nisbet makes a similar observation:

> Medieval society, from the point of view of formal authority, was one of the most loosely organized societies in history. Despite the occasional pretensions of centralizing popes, emperors, and kings, the authority that stretched theoretically from each of them was constantly hampered by the existence of jealously guarded "liberties" of town, gild, monastery, and village.[19]

And Leonard Liggio remarks that, after 1000 A.D.,

> while bound by the chains of the Peace and Truce of God from looting the people, the uncountable manors and baronies meant uncounted competing jurisdictions in close proximity. . . . This polycentric system created a check on politicians; the artisan or merchant could move down the road to another jurisdiction if taxes or regulation were imposed.[20]

At the origin of this complexity is the failure of the Imperial design to realize a political unification of the Christian world. European capitalism grew in part because of the weakness of political power.

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[18]Boudewijn Bouckaert, "L'aria delle città rende liberi: Le città medievali come comunità volontarie," *Biblioteca della libertà* 29 (1994), p. 10, n. 127. An English version of this article, without the passage quoted above, is "Between the Market and the State: The World of Medieval Cities," in *Values and the Social Order*, ed. Gerard Radnitzky (Aldershot: Avebury, 1997), vol. 3, pp. 213–41.

[19]Robert Nisbet, *The Quest for Community* (San Francisco: Institute for Contemporary Studies, 1990) p. 99.

[20]Leonard Liggio, "The Medieval Law Merchant: Economic Growth Challenged by the Public Choice State," *Journal des Économistes et des Études Humaines* 9, no. 1 (March 1999), p. 65.

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In the second part of the Middle Ages, the Emperor was not in condition to subjugate the Catholic Church, merchants, artisans, bankers, and the countless small armies. As a consequence, the last centuries of the Middle Ages were marked by the success of a pluralist order characterized—as it had been since the ninth century A.D.—by many *allodial properties*, free from regal control and from every form of political (eminent) domain.[21] In his *Edictum Pistense* (864 D.C.), Emperor Charles "The Bold" censured all those who "built castles and fortresses without any permission and in an illegal way" (*castella et firmitates et haias sine nostro verbo fecerunt*). But the weakness of Imperial power encouraged the diffusion of self-protection and this "form of possession free from any obligation."[22]

Defenders of a libertarian European heritage must acknowledge their history of property rights, pluralism, and competition. They also have to rediscover a rational way to solve conflicts and manage quarrels without resorting to a compulsory state logic or to a central coercive power.

Superstition # 3: The existence of a European identity calls for the construction of a single state in Europe.

As there are important differences among England and Greece, Spain and Germany, or France and Poland, there are different ways to be European. While Europeans have in common many characteristics which distinguish them from, say, Africans or Asians, this fact doesn't imply the necessity of a single European state.

On the contrary, as indicated earlier, one of the most important elements of this European identity is history, and history has not always been the nation-state's dominion. In fact, *pluralism* has been the key of European historical success, and such pluralism meant the absence (at the end of the Middle Ages) of a powerful center of

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[21]This situation lasted sometimes until the fifteenth century. As Peter Partner remarks about the Papal State, a large number of lords commonly described as *barons* "were, in reality, allodial landowners, whose tenure was in no way feudal." See Peter Partner, "The Papal State: 1417–1600," in *Conquest and Coalescence: The Shaping of the State in Early Modern Europe*, ed. M. Greengrass (London: Edward Arnold, 1991), pp. 34–35.

[22]Giovanni Tabacco, "L'allodialità del potere nel Medioevo," *Studi Medievali* 11, no. 2 (1970), p. 571.

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political decisions. Europe had Church, Empire, a number of kings and princes, a multitude of feudal relationships, and, in some regions, independent cities, but it never had a small group of rulers able to organize economic life and civil society. "The dark centuries have undeniably diffused a spiritual order, but also a deep disorder in politics and the economy,"[23] noted Jean Baechler in his important study about the origins of capitalism and the role of medieval anarchy. This manageable chaos explains our success.

Nevertheless, the nation-state has been a compromise between the will to realize a universal political control and the resistance of the society (religion, economy, culture). The failure of the Imperial project at the end of the Investiture Contest was exploited by Norman theorists (Hugh of Fleury, for instance) who re-elaborated old concepts in relation to new "national" powers (*regna*).[24] In Europe, the contrast opposing Church and secular institutions is a constant of the period prior to the full success of the state.

In France, Spain, or England, power began a long journey toward absolutism, but the presence of multiple state organizations was always an opportunity for the freedom of individuals, even as it reduced the capacity of the ruling classes to exploit and dominate civil society. This is another reason why the will to unify Europe shows a serious misunderstanding of what European identity is, and prepares for a subversion of its deepest heritage.

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[23]Jean Baechler, *Les origines du capitalisme* (Paris: Presses Universitaires de France, 1971), p. 111. On p. 126, Baechler wrote that "the expansion of capitalism has its origins and its rationale in the political anarchy" of medieval times.

See also Robert S. Lopez, *The Commercial Revolution of the Middle Ages, 950–1350* (Cambridge: Cambridge University Press, 1976); E.L. Jones, *The European Economic Miracle* (Cambridge: Cambridge University Press, 1981); Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 1983); David S. Landes, *The Wealth and Poverty of Nations: Why Some Are So Rich and Some So Poor* (New York: Norton, 1999); and Richard Pipes, *Property and Freedom* (New York: Knopf, 1999).

[24]Hugh of Fleury (Hugonis monaci Floriacensis), *Tractatus de regia potestate et sacerdotali dignitate*, vol. 2, *Monumenta Germaniae Historica*, *Libelli de lite*, ed. E. Sackur (Hanover: Hahn, 1892), pp. 466–94.

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Superstition # 4: There will be harmony in a unified Europe, and political institutions will be able to support the development of poor societies (Eastern Europe, for instance).

This idea of "forced" solidarity is not compatible with libertarian principles, or with the notion that people must be respected in their dignity and liberty. The public redistribution of resources implies a strong centralized power capable of controlling society.

Recent Italian experience also teaches us that coercive solidarity creates hostility where there had been harmony and respect. Northern and Southern Italy enjoyed relatively good relations for centuries; traditional political divisions didn't hinder cultural and economic exchanges, and there was no intolerance. Current social and cultural tensions between these regions result from a unified policy, which is a consequence of the 1861 birth of the Italian Kingdom. At the end of the nineteenth century, protectionist governments aided Northern industries and damaged Southern agricultural exports. The situation changed in the twentieth century, when the creation of an important welfare state was the cause of massive redistribution from the rich North to the poor South. In addition, the various Italian peoples were forced to live together and abide by the same rules. The first consequence of these political decisions is that there is now a considerable and widespread hatred between Northern and Southern Italy. While the free market has a tendency to bring people together, coercive politics tend to divide them. Moreover, the Italian experience of political unification shows that statist solidarity has not been a tonic for poor economies. In the last fifty years, Northern firms and families have spent a great deal of money financing programs for the South. However, the occasional encouraging changes or trends come only from local and spontaneous initiatives.

Welfare programs redistributed money to the mafia and to large firms, multiplied public employees, strengthened trade unions, and reduced incentives for work. Eastern Europeans in particular must keep this Italian lesson in mind, because they have to refuse a model of development based on political investments and bureaucratic regulation. The main source of economic and social growth is to be found in property rights, and it is quite evident that the logic of coercive solidarity is the explicit negation of this legal order.

Hernando de Soto's most recent book offers us a useful confirmation of libertarian theses. In the analysis developed in *The Mystery*

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of Capital, poverty is seen not only as a consequence of the lack of private property rights, but also as the fatal result of a social order incapable of producing trust or of transforming concrete assets into immaterial and "abstract" capital (necessary to finance new ideas and realize capitalist growth). As de Soto points out, Third World and former communist peoples "have forgotten (or perhaps never realized) that converting a physical asset to generate capital—using your house to borrow money to finance an enterprise, for example—requires a very complex process." The creation of capital requires a conversion process, because "capital is first an abstract concept and must be given in a fixed, tangible form to be useful."[25]

This difficult evolution toward capitalism cannot be the outcome of a political economy based on state aid and regulation. Only the *other path* (free-market economy, competition, and individual responsibility) can present conditions to offer a future to Eastern Europe and to all countries in search of justice, wealth, and civilization.[26]

WHAT CAN WE DO? FOUR IDEAS FOR THE FUTURE

Refusing European Political Unification, Defending Free Trade and Globalization

Because the creation of this cartel of monopolist rulers would reduce institutional competition and individual freedom, we must oppose the project of European political unification. In a large and politically unified country, the welfare state will find no hurdles, so redistributive policies will become the rule. Every government expenditure affects a large number of people, but the single individual usually pays only a fraction, and, thus, prefers not to bother with organizing a resistance. The consequence is an increase in taxation and the satisfaction of many lobbies.

Some economists believe that European unification would bring about the abolition of all internal barriers to free trade. However, this

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[25]Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000), pp. 40, 42–43.

[26]See Hernando de Soto, *The Other Path: The Invisible Revolution in the Third World* (New York: Harper & Row, 1989), in which he discussed the economies of developing nations.

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idea is not true. For instance, a directive adopted in 1973 allowed the United Kingdom, Ireland, and Denmark to make chocolate containing up to 5% vegetable fats, but not to sell it as chocolate in other member states. As a result, the Italian, Belgian, and French governments obtained a prohibition of chocolate imports from other member states. Through health and safety regulation, there are now similar directives against Spanish strawberries, French camembert, and so on.[27]

In addition, the political leaders of a unified Europe might try to build a protectionist Europe, an unassailable fortress against Asian and American competitors. To pursue this kind of policy would be impossible in a small nation (incapable of self-sufficiency), but a large area, such as Europe, can help to foster the illusion that protectionism will help the economy, protect wages, and bring about full employment. As Hans-Hermann Hoppe emphasizes, "a country the size of the U.S., for instance, might attain comparatively high standards of living even if it renounced all foreign trade, provided it possessed an unrestricted internal capital and consumer goods market."

On the contrary, in small jurisdictions, this error is less frequent, because "the smaller the country, the greater the pressure to opt for free trade rather than protectionism."[28] Swiss Cantons, Liechtenstein, San Marino, Andorra, or Monaco never dreamed of obtaining advantages by refusing international trade. These small political communities—the true and only heirs of the great European spirit—are interested in the diffusion of libertarian and free-market principles. They want to export their specialties and buy all the goods they can't (or won't) produce. In fact, these small political entities are in the best position to teach an important lesson: the international division of labor is useful for individuals, families, communities, and companies.

For this reason, it is urgent to reject the project of a politically unified Europe, and to adopt an alternative model—a more flexible one based on pacts and contracts. If "Europe" exists—and a European identity is clearly in our past and our present—it can exploit the opportunity of economic integration (globalization) and free movement of

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[27]Fred Aftalion, "Regulatory Competition, Extraterritorial Powers and Harmonization: The Case of the European Union," *Journal des Économistes et des Études Humaines* 9, no. 1 (March 1999), pp. 98–99.

[28]See Hans-Hermann Hoppe, "Small is Beautiful and Efficient: The Case for Secession," *Telos* 107 (Spring 1996), p. 100.

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information. In the international circulation of money, goods, and ideas, we don't see a central planner: order emerges spontaneously as a result of voluntary cooperation.

In a free society, it can be easy to satisfy our need to rediscover our common historical heritage and develop institutional and economic links. In a Europe based on property rights, the wall that still divides West and East could quickly disappear and, free from the rigid constructivism of their politicians, European peoples could organize new and truly federal relationships.

Free European Relationships in a Polycentric World

For centuries, within the structure of the nation-state, the idea of sovereignty guaranteed that the King and, then, Parliament were able to control society. But this hierarchical construction was also the premise of an anarchical international order. The Kantian idea of a world federation, the distant progenitor of contemporary European unification, must be explained as the logical consequence of an international regime based on sovereign entities.[29]

The paradox of the nation-state is in its promise of law and order only within its borders: *internal hierarchy* and *external autonomy* (the so-called *international anarchy*). But if modern political culture preferred hierarchy to anarchy (and it adopted the Hobbesian framework), the result was that our international (dis)order had to be modified. If the state had the task of avoiding violence inside its borders, Kant imagined a parallel solution to the problem of law and order in the international arena. In other words, the pursuit of peace and harmony among different peoples could happen only through a "higher" (both ethically and geographically) political center able to reduce conflicts to a minimum.

The Kantian dream of "eternal peace" is the politically correct version of the projects of Napoleon and Hitler, the political leaders more seriously engaged in the construction of a European state. Present-day prophets of a united world share with these statesmen a strong preference for a society directed, more or less violently, by a small political elite. Furthermore, they have in common a similar distrust about human liberty.

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[29]Immanuel Kant, *Plan for a Universal and Everlasting Peace* (New York: Garland, 1973).

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One must also understand that European unification is only one step toward global unification, and that the determination to abolish political polycentrism is the most important threat to freedom. As already noted, Europe's finest hour was characterized by a system of hundreds of semiautonomous entities with a free and open market.[30]

At the same time, opposing continental unification means rejecting the neo-protectionism of those media heroes, the "Seattle people." For this reason, European peoples must defend their traditional values: openness, competitiveness, respect for their fellow men and their rights, localism, and free spontaneous commonality. But they must also be honest and acknowledge the fact that many important European values migrated to North America in ships carrying European colonists and religious dissenters to the Atlantic coast. Our hope is that these traditional values have not left the continent forever.

Federal Europe, Free Communities, and the Right of Secession

Against the pseudo-federalism of Maastricht, classical liberals and libertarians must speak up on behalf of the true federal tradition. In the West, we have a great deal of historical experience: Jewish tribes, Greek *poleis*, ancient German communities, Italian and Flemish medieval Communes, the Hanseatic League, the Dutch United Provinces, the Swiss Confederation, and the early republic in Jeffersonian America. We also have classical liberal and libertarian thinkers who paid attention to this topic, from Althusius to Jefferson, from Calhoun to Lord Acton, and from Spooner to Nock.

There are currently social theorists working on a correct vision of federal theory. For instance, some ideas of Bruno S. Frey can be useful in showing a possible evolution toward an increasingly free and competitive society. The project of FOCJ (functional, overlapping, and competitive jurisdictions) and the idea of a solid utilization of the "right of secession" (with the purpose of creating *nations*

[30]German history, in this sense, is interesting. Before the Napoleonic wars, Germany consisted of hundreds of independent political units. There were important regional states such as Prussia or Bavaria, but also a multitude of free cities, knightly manors, and other small territorial entities. Besides any other consideration, in that institutional context, the rise of a Hitler was an evident impossibility.

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by consent and a true market for institutions, where individuals can shop for the best political arrangements) are the prerequisites for constructing federal relationships among individuals and groups.[31] Despite his unjustified insistence about the role of direct democracy (and the inconsistent defense of the welfare-distributive logic), the institutional framework Frey imagined would be a good step toward a European federation.

But *a federal Europe is exactly the opposite of a unified Europe*. In emphasizing the need to develop negotiated connections among small political communities, I want to stress the difference between the existing Europe and the voluntary political order that European libertarians favor. In a federal institution, Roland Vaubel wrote, "each member state would have the explicit right to leave the union at any time, if a simple majority of its population voted in favor of secession."[32] The possibility for any community to dissolve the federal compact (the right of *exit*) is the only condition that can force the central power to respect the rights of the federation's members (states, regions, cities, and individuals).

For this reason, it is important to support every political "devolution" of powers from the center to the separate local entities: from London to Scotland, from Rome to Lombardy, from Madrid to Catalunia. In the project of realizing a true federalist Europe, it is decisive that regions and cities can opt to secede, and that they can discuss their bond with the nation-state and the European Union.

In this sense, we must also defend the idea that federalism can be a strategy to imagine and achieve political relationships *without the state* (or *beyond* and *after* the state). In fact, federal pacts imply mutual agreements and horizontal contracts. Federalism, the theory of political pacts, demands a new elaboration of the notion of *political community*. In a true federal society, the right to abandon the union

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[31]Bruno S. Frey and Reiner Eichenberger, "Competition Among Jurisdictions: The idea of FOCJ," in *Competition Among Institutions*, ed. L. Gerken (London: Macmillan, 1995).

[32]Roland Vaubel, "The Political Economy of Centralization and the European Community," *Journal des Économistes et des Études Humaines* 3, no. 1 (March 1992), p. 41. From a libertarian point of view, it is not easy to understand why, in Vaubel's statement, the right of secession is given only to states, and not to regions, cities, or individuals. The reference to the coercive decisions of majority groups is also ethically unacceptable.

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must be preserved; after all, this is the most important guarantee that the federal authority will respect different realities.

If European politicians and bureaucrats are, in fact, impatient to destroy our right to abandon the secular Paradise they are planning for us, the reason is that they want to be free to make it as close to Hell as possible. The Euro nightmare under construction will be a land with Italian bureaucracy, French regulation, Scandinavian taxation, German trade unions, and no right to opt out.

Human Dignity and the Spirit of Europe

Against socialist solidarity (whether nationalist or internationalist), classical liberals and libertarians must protect the dignity of human beings and their right not to become objects of political and coercive decisions. We have to defend our experience of true solidarity: in families, associations, churches, and so on. We must understand that state charity is a pretext of political rulers eager to increase their power at the expense of the people. Furthermore, we must explain that the political machine operates a redistribution that never helps the poor. In general, redistribution for benefits the strongest lobbies. It helps the rich, intelligent, and sophisticated citizen; in brief, it helps only those who know how the system really works.

Even in this case, a comparison between Europe and America is useful. Because the government is less invasive and property rights are more protected in the United States, there is an important net of private mutual aid associations. Our ability to attain a sense of true solidarity and community rests directly on our freedom.

Against the new socialism of Philippe van Parijs (who proposes that everyone—including California surfers—be paid a *universal basic income* at a *subsistence* level),[33] and against Habermas's idea of universal democratic integration,[34] it is important that we preserve the individual's right to reject political obligation. *Honest men don't respect unjust laws.*

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[33]Philippe Van Parijs, "Why Surfers Should be Fed: The Liberal Case for an Unconditional Basic Income," *Philosophy and Public Affairs* 20, no. 2 (Spring 1991), pp. 101–31.

[34]See Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory* (Cambridge, Mass.: MIT Press, 1998).

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But, in the new millennium, only a radical change in our vision of society can bring about a rebirth of European liberties. As Étienne de la Boétie pointed out,[35] the power of the political elite can be explained only by the fact that people *voluntarily* obey laws (he called it the *mystery of civil obedience*). Consequently, when we cease to obey, unjust power will disappear, and we will have the opportunity to build a more civilized way to live together.

The Catholic Church played an important role in the great miracle of medieval Europe, It was, undoubtedly, the main hindrance that Empire found in its attempt to build an absolute power. Its moral and cultural force (and also its economic and military importance) was influential in preventing the complete triumph of the imperial design. The strong relationship between the German Emperor and the Franciscans—both averse to the wealth of the clergy and the political power of the Pope—and the struggle of Philip "The Beautiful" against the Templars are two different confirmations of the fact that the presence of a rich and influential Church was, for a long time, a restraint to any political ambition to subjugate the society.

While much in the contemporary context is radically changed from medieval Europe, religious communities can remain an obstacle for the ruling class. For this reason, every tradition, ethnic group, culture, and language (when they become the occasion for a conscious action of resistance in the face of state power and its will to standardize society) must be appreciated as instruments for the defense of everybody's freedom.

The actual situation seems more complex, but, despite the philosophical and religious differences separating European individuals, there is a common heritage strictly related to the Christian roots of the continent: at the center of this culture, there is the idea of the infinite value of every individual. When Murray N. Rothbard developed his social ethics on the non-aggression axiom, he rediscovered an important element of European society, and suggested a hypothesis for how to overcome the present situation.

During the modern age, Europeans have considered the existence of a two-class order, with rulers and subjects, as natural. Only a small group of libertarian thinkers have expressed their dissatisfaction with

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[35]Étienne de la Boétie, *Discours de la servitude volontaire* (Paris: Presses Universitaires de France, 1983).

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this situation, and have engaged in a cultural campaign for liberating the *new slaves* of monarchical and democratic regimes. But the current unqualified acceptance of despotism is also the consequence of a lack of ethical responsibility. This European crisis, generated by the widespread acceptance of aggression and the refusal to resort to self-defense, has moral origins.

Therefore, a complete change in the way we connect with other people implies a rediscovery of human dignity and a more vivid sense of altruistic responsibility toward our fellow men, as well as ourselves. If Europeans will be generous and at the same time more respectful of individual natural rights, the claims of public authorities to justify their role as social benefactors will appear to everyone as a tragic farce. And we will all see that the Emperor—even the European Emperor—has no clothes.

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THE EUROPEAN UNION'S AMERICAN PEDIGREE: LESSONS FROM THE OTHER SIDE OF THE ATLANTIC

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> Human nature is the same on every side of the Atlantic, and will be alike influenced by the same causes. The time to guard against corruption and tyranny is before they shall have gotten hold on us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered. – Thomas Jefferson[1]

The European Union is a continental movement with an American pedigree. The phenomena of European "integration" and "harmonization" (innocuous terms for a pernicious enterprise) re-enact the evolution of the American Union: the judicial conversion of sovereign states into municipalities and, concomitantly, the homogenization-centralization of political life by a stratified agent turned superior. The commonalities between the American and European unions reflect the recurrent dynamics by which autonomy is undermined.

AN AUTOPSY OF AMERICAN FEDERALISM

The Constitutional Convention

> This Constitution is said to have beautiful features; but when I come to examine these features, Sir, they appear to me horridly frightful. – Patrick Henry, at the Virginia Ratifying Convention, 1788[2]

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[1]Thomas Jefferson, *Notes on the State of Virginia*, in *Thomas Jefferson: Selected Writings*, ed. Harvey C. Mansfield, Jr. (Arlington Heights, Ill.: Harlan Davidson, 1979), p. 31.

[2]Ralph Ketcham, ed., *The Anti-Federalist Papers and the Constitutional Convention Debates* (New York: Mentor, 1986), p. 213.

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The Constitutional Convention signified the commencement of federalism's decline—an ostensible *non sequitur*, given federalism's innovation during the Founding. Heresy or not, the Convention's propellants sought to implement a unitary political order, not a federal one. James Madison pushed for the ultra-nationalist Virginia Plan, which "rained blow after blow on the states."[3] If Madison, Hamilton, and other nationalists had prevailed, the states would have been provinces of a central regime. The Anti-Federalists understood their opponents' objective, and admonished against it persistently.[4]

The Constitution reflects the ideological competition behind its conception. On one hand, the nationalists gained a number of victories: a uniform military, currency, and diplomacy, in addition to domestic prohibitions (no Bills of Attainder, *ex post facto* laws, etc.).[5] The states no longer exercised some standard attributes of sovereignty. A further institutional victory came in nationalistic structure of the House of Representatives, whose approval is required for a law's passage.

As Madison recognized, however, the Constitution is federal in foundation.[6] Ratification occurred through the approval of nine state conventions, their approval binding only upon themselves. A nationalist ratification would have occurred through a plebiscitary framework, e.g., a majority vote by the states or the people of the states binding on all. A complementary institution is the amendment process. For a constitutional amendment to pass, three-quarters of the states' legislatures must approve. Population is not a criterion in this scheme; currently, in fact, a constitutional amendment may be defeated by the thirteen least populous states, or ratified without the approval of the thirteen most populous states. The amendment process confers a premium not upon majoritarian nationalism but upon state equality in a federal republic. Another key federal institution is the Senate.[7]

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[3]Garry Wills, *A Necessary Evil: A History of American Distrust of Government* (New York: Simon and Schuster, 1999), p. 76. For a discussion of Madison's unitary vision, see Myles Kantor, "James Madison's Ambivalent Architecture," *LewRockwell.com* (March 22, 2001).

[4]See Ketcham, *The Anti-Federalist Papers and the Constitutional Convention Debates*, passim.

[5]See U.S. Constitution, art. 1, secs. 8 and 10.

[6]"In its [the Constitution's] foundation, it is federal, not national." James Madison, *Federalist No. 39*, in *The Federalist Papers*, ed. Clinton Rossiter (New York: Mentor, 1999), p. 214.

[7]This institution is currently under a *sub silentio* siege. See Myles Kantor, "The Senate Abolitionists," *LewRockwell.com* (January 3, 2001).

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Thus, while the Madisonian-Hamiltonian bid for national supremacy failed and the states retained ultimate autonomy, there remained a manifest drift toward consolidation in the Convention's inception, as well as in the organic law it engendered.

An Imperial Interlude

> It must be manifest that the sovereignty of the people was now extinct, and those ruled who had the bayonets on their side. – Jefferson Davis, on Reconstruction[8]

The American federal union existed for less than a century before it collapsed in 1861. The collapse in question refers not to the withdrawal of the Southern states from the union, but to the war levied against those states in their subsequent union, the Confederate States of America. The Tenth Amendment's guarantee of reserved powers notwithstanding, Abraham Lincoln deemed the Confederacy to be an insurrection, and prosecuted a bloodbath to cement his unitary ideology. It cannot be over-emphasized that the Union's conquest of the Confederacy was grounded not in abolitionist zeal but in territorial covetousness. In fact, Lincoln's (il)logic would have required suppression had the North, instead of the South, seceded to free itself from compliance with the draconian Fugitive Slave Act of 1850.[9]

The upshot of Confederate conquest was nothing less than an inversion of American federalism. Although a constitutional amendment prohibiting secession did not follow the war, the message was clear: leave and be smashed. Without the fundamental freedom to withdraw, federalism is a sham. Just as a citizen's pre-eminent right entails voting with one's feet (i.e., emigration), a polity's paramount right is secession. The denial of these rights imposes a state of subjugation.

Reconstruction was the martial follow-up to the Confederacy's imperial annihilation. While the Union held that the Confederate states had never withdrawn (and were, therefore, insurrectionists),

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[8]Jefferson Davis, *The Rise and Fall of the Confederate Government* (New York: Da Capo Press, 1990), vol. 2, p. 641.

[9]Given the disunionist intensity of prominent abolitionists, Northern secession was a genuine possibility. William Lloyd Garrison observed at the outset of the war, "All union-saving efforts are simply idiotic." Quoted in Jim Powell, *The Triumph of Liberty* (New York: Free Press, 2000). See also Myles Kantor, "Union and Bondage," *Mises.org* (April 12, 2001).

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readmission was required post-bellum. This position's senselessness reflects the hegemonic incoherence of Radical Republican legislators. To effectuate dominance over the "conquered provinces" (to use Thaddeus Stevens's phrase), the Republican Congress passed the First Reconstruction Act over President Andrew Johnson's veto in 1867. The pertinent language read:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That said rebel States shall be divided into military districts and made subject to the military authority of the United States as hereinafter prescribed; and for that purpose Virginia shall constitute the first district; North Carolina and South Carolina the second district; Georgia, Alabama, and Florida the third district; Mississippi and Arkansas the fourth district; and Louisiana and Texas the fifth district.[10]

There's no doubt that the delegates to the Constitutional Convention would have scoffed if they were told that, within a century, the states would be invaded and ravaged for withdrawing, and then have their statehood eviscerated as federal protectorates. Political vicissitudes can be staggering.

Brutus Vindicated: The Judicialization of American Autonomy

> The judicial power will operate to effect, in the most certain, but yet silent and imperceptible manner . . . an entire subversion of the legislative, executive, and judicial powers of the individual states. – Brutus, January 13, 1788[11]

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[10]Texas State Library and Archives Commission, "The Reconstruction Acts: 1867," www.tsl.state.tx.us. Charles Bracelen Flood, in *Lee: The Last Years* (New York: Houghton Mifflin, 1998), p. 148, describes the effect on Virginia, and, by proxy, every affected state: "Any civil government that did exist in the state was deemed to be purely provisional in nature, existing at the sufferance of Washington. The Congress declared that it had the right to abolish or change any aspect of local government throughout the South, at any time and without previous notice. . . . The South was now formally and unequivocally a zone of military occupation, with no other status in the eyes of the Federal government. The lock was on." Emory Thomas, in *Robert E. Lee: A Biography* (New York: W.W. Norton, 1997), p. 385, similarly observes, "[T]hey were not states, but portions of districts administered by the United States Army."

[11]Brutus, *Letter XI*, in Ketcham, *The Anti-Federalist Papers and Constitutional Convention Debates*, p. 296.

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If the ambivalence between an American Nation-State and a union of sovereign states appeared from the start, so did the judicial process whereby the former would be entrenched in the twentieth century. There are copious cases in this vein, but one will suffice to reflect the severity of self-government's displacement by the judiciary.

Reitman v. Mulkey (1967)[12]

In the early 1960s, the State of California passed a law prohibiting racial discrimination in housing. By 1964, the people of California had grown sufficiently intolerant of this proprietary infringement to pass the following referendum, Proposition 14, by a vote of 4,526,460 to 2,395,747:

> Neither the State nor any subdivision or agency thereof shall deny, limit, or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease, or rent any part or all of his real property, to decline to sell, lease, or rent such property to such person or persons as he, in his absolute discretion, chooses.

California's Supreme Court proceeded to nullify Proposition 14 under the notion that it constituted state encouragement of racial discrimination, and, therefore, violated the Fourteenth Amendment's Equal Protection Clause.[13] The U.S. Supreme Court affirmed the California ruling by a 5-4 vote. Justice Harlan observed in dissent how the Court's affirmation of California's encouragement thesis had the effect of "forging a slippery and unfortunate criterion by which to measure the constitutionality of a statute simply permissive in purpose and effect, and inoffensive on its face." Moreover, the Court's ruling implied the perpetuity of the legislation Proposition 14 sought to repeal: "Opponents of state anti-discrimination statutes are now in a position to argue that such legislation should be defeated because, if enacted, it may be unrepealable."[14] The effect of *Reitman* was, thus, to undermine protection of property rights and popular sovereignty.

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[12]387 U.S. 369.

[13]The Fourteenth Amendment, of course, had a less-than-pristine ratification process. See Forrest McDonald, *States' Rights and the Union: Imperium in Imperio, 1776–1876* (Lawrence: University Press of Kansas, 2000), pp. 212–13.

[14]The Fair Housing Act of 1968, prohibiting discrimination on the basis of race, religion, sex, etc., rendered *Reitman* moot. See U.S. Department of Housing and Urban Deveopment, "Fair Housing and Equal Opportunity: Fair Housing Act," www.hud.gov.

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So here is political life in America, 212 years after the Constitution's implementation: member states of the (so-called) federal union may not withdraw, and may not safeguard their citizens' property rights, among other self-determining acts.[15] In other words, an electorally unaccountable coterie in the District of Columbia holds veto power over the internal affairs of fifty discrete governments bound to a union consensually or not. The caprices of five or more justices now constitute the determinative opinion in American government.

This shabby state of affairs vindicates the great Anti-Federalist, Brutus. Brutus considered the proposed constitution a unitary blueprint "calculated to abolish entirely the state governments, and to melt down the states into one entire government, for every purpose as well internal and local, as external and national." He attributed the effectuation of this abolition to the Supreme Court:

> Perhaps nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial. They will be able to extend the limits of the general government gradually, and by insensible degrees, and to accommodate themselves to the temper of the people.[16]

Reading these words in 2001, what is salient is the precision with which Brutus admonished against Publius's nationalist organic law. Today's federal primacy has indeed been achieved through the sophisticated incrementalism of the judiciary. The prestige of that branch has subtly instilled a sense of supremacy in the populace that it controls. While critical comments about the Court are common, Americans are generally inured to its chronic nullification of self-government. The fifty state governments that exist today are Potemkin sovereignties, provinces of an agent that has inverted its relationship to the principals from which the federal mandate originally derived.[17]

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[15]See, for instance, *Coker v. Georgia*, 433 U.S. 584, which invalidated capital punishment for rape as violative of the Eighth Amendment's prohibition against cruel and unusual punishment; and *Stenberg v. Carhart*, 000 U.S. 99-830, which invalidated a law prohibiting partial-birth abortion on the grounds that it imposes an "undue burden" on a woman's "right" to an abortion.

[16]Brutus, *Letter XV*, in Ketcham, *The Anti-Federalist Papers and the Constitutional Convention Debates*, p. 308.

[17]The Tenth Amendment to the United States Constitution reads, "The powers not delegated to the United States by the Constitution, nor prohibited by

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JURIDICAL CONSOLIDATION IN EUROPE, OR, THE VIRGINIA PLAN ABROAD

> The EU is not yet the kind of federal institution Jean Monnet and his colleagues foresaw, but it *has* moved closer to a federal structure than any other international organization. – John McCormick[18]

> The philosopher Kierkegaard said the most effective revolutions are the ones that left the buildings standing and the semblance of everything the way it was, but dragged away the real meaning from them so they no longer really existed, but just appeared to do so. *That's* the kind of revolution Britain is undergoing—one where all the buildings are left standing, all the institutions appear still to be there. But their power and significance have just been drained away and they don't really rule the country anymore. We don't have a Parliament, or an English law, or indeed our independence. – Peter Hitchens [19]

> . . . that monument to the pretensions of technocratic rationality, the European Union. – Paul Campos [20]

If the American federal union collapsed within three-quarters of a century, the European Union has outdone the rapidity of its predecessor. It has been slightly more than fifty years since the Schuman Declaration inaugurated Europeanism on May 9, 1950. His vision of "the federation of Europe"[21] has materialized so extensively that it is now almost erroneous to speak of Europe as a collection of nation-states, rather than a collection of Eurocratic municipalities. Indeed, *The Economist* recently proposed "A Constitution for Europe."[22]

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it to the States, are reserved to the States respectively, or to the people." The use of "delegated" reflects the relationship between the states and federal government. (The derivative of "delegate" is the Latin *delegare*, "to depute down.")

[18]John McCormick, *The European Union: Politics and Policies*, 2nd ed. (Boulder, Colo.: Westview Press, 1999), p. 88.

[19]Peter Hitchens, "Geoff Metcalf Interviews Author Peter Hitchens on the End of England," *WorldNetDaily.com* (January 21, 2001).

[20]Paul F. Campos, *Jurismania: The Madness of American Law* (New York: Oxford University Press, 1998), p. 182.

[21]See McCormick, *The European Union*, pp. 47–48.

[22]"A Constitution for the European Union," *The Economist* (October 28–November 3, 2000).

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There are several manifestations of the EU's de-nationalization campaign, including the movement toward Qualified Majority Voting in the Council of Ministers, the existence of a European Parliament, the attempts to homogenize Europe's currency with the Euro, and the plans for a European military force.[23] The most potent mechanism by which Europe's sovereignties have been undermined, however, is EU law and the juridical Leviathan that is part and parcel of it—specifically the incorporation of human rights law into national policy by the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR).

I will take an Anglo-centric perspective in examining the effect of EU law and its advancement by the ECHR and ECJ. In examining the current condition of British autonomy under Eurocratic governance, we observe the distinctly American feature of judicial supremacy at work with the attendant establishment of oligarchy.

The Human Rights Act, Charter of Fundamental Rights, and Their Consequences

In October 2000, the Human Rights Act (HRA) took effect and incorporated the European Convention on Human Rights into British law. Tony Blair's wife, Cherie Booth, describes the watershed legislation as a modernizing mechanism "to make [Britain] a strong and confident democracy in the twenty-first century"; barrister David Pannick writes that the Act "enhances the maturity of our legal system and offers our courts a greater potential to do justice"; Professor Conor Gearty of King's College in London argues that it represents the "most significant formal redistribution of political power in this country since 1911 and perhaps since 1688."[24] December 2000 saw the signing of the Charter of Fundamental Rights (CFR) in Nice, an

[23]Plans for a European Defence Identity and Rapid Reaction Force portend the worst kind of centralized power. See John Major, "Britain may come to regret Blair's Euro-army muddle," *The Daily Telegraph* (May 18, 2001). Granted, this centralization has not been shrouded from EU member states. Title V of the 1992 Treaty of Maastricht explicitly aspires to "a common foreign and security policy."

[24]Cherie Booth and Rabinder Singh, "Law that will turn dreams of equality into reality," *The Telegraph* (August 7, 2000); David Pannick, "What could be more British?" *The Times* (October 3, 2000); and Joshua Rozenberg, "Judges strike the rights balance," *The Telegraph* (December 19, 2000).

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ostensibly symbolic action that a number of prominent Eurocrats consider binding.[25]

By definition, incorporation entails standardization, and the HRA and CFR entail massive standardization. Article 3 of the former prohibits "inhuman or degrading treatment or punishment," and the Sixth Protocol abolishes capital punishment.[26] The CFR is even more expansive, creating European citizenship, rights to education (Article 14), protection against "unjustified dismissal" (Article 29), and working conditions that respect "health, safety, and dignity" (Article 30). Article 23 requires comprehensive equality between men and women all the way down to employment policies (work, pay, etc.). Indeed, the ECJ's Advocate General has deemed Britain's failure to guarantee paid holidays to be violative of the CFR.[27] As for a quaint institution like property rights, Article 17 states that "The use of property may be regulated insofar as is necessary for the general interest."[28]

What is "unjustified dismissal," or "the general interest"? What constitutes "inhuman or degrading treatment or punishment"? These nebulous promulgations will have to be defined and enforced by a political entity, and the supra-national judiciaries of the ECHR and the ECJ are the entities which will define and enforce these elastic enactments. These conspicuously elitist institutions will enjoy adjudicative

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[25]Nicole Fontaine, the French President of the European Parliament, has affirmed, "Everyone should be aware that we will treat this charter as a legal document." "Here's a Nice mess," *The Telegraph* (December 10, 2000). In the same article, Italian Foreign Minister Lamberto Dini calls the charter an initial step to establishing an EU constitution. Former President of the European Commission Romano Prodi notes, "[I]t will be possible to envisage calmly how to incorporate the Charter in the founding treaties of the Union. The Commission would like to see this happening as soon as possible." European Union, "Press Release," December 7, 2000.

[26]Peter Hitchens highlights the significance of the Sixth Protocol: "[A]nti-hanging MPs quietly used the Human Rights Bill to make it impossible for the House of Commons to reintroduce capital punishment, ever." This "cemented the revolution in criminal law begun in 1957 with the Homicide Act." Peter Hitchens, *The Abolition of Britain: From Winston Churchill to Princess Diana* (San Francisco: Encounter Books, 2000), p. 304.

[27]See Joshua Rozenberg, "Paid leave a right, EU lawyer says," *The Telegraph* (February 9, 2001).

[28]"Draft charter of the fundamental rights of the European Union," *The Telegraph* (September 21, 2000).

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supremacy (in this case, the same as discretionary supremacy) over a body of law that affects the internal affairs of EU member states.

British Euroskeptics rightfully consider this subversive of their polity's parliamentary structure. Journalist Peter Hitchens and philosopher Roger Scruton describe the consequences as the abolition of Britain and forbidding of England, respectively.[29] The transfer of ultimate political authority from the legislature to the judiciary (and a non-British judiciary at that) is a radical alteration of British government—hence, Gearty's comparison of the HRA to the Parliament Act and Glorious Revolution. Luxembourg and Strasbourg are now the sites where policy for Britain and the rest of Europe shall be made.

This may be described as the Eurocratization of the Virginia Plan. Under the Virginia Plan, the American states then under the Articles of Confederation would have had their laws subject to a congressional veto and been without equal suffrage in the proposed Senate. To quote Madison, there would exist a "negative in all cases whatsoever on the local legislatures" and "a government which, instead of operating on the states, should operate without their intervention on the individuals composing them."[30]

The EU is emulating Madison's vision. The ECHR and ECJ exercise a *de facto* veto on member states' laws, and the EU operates directly on its "citizens." Thus, the EU is not a mere inter-governmental association but a discrete and dominant political entity, its prestige reinforced through august judicial agencies. Brutus's admonishment warrants reiteration:

> Perhaps nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial. They will be able to extend the limits of the general government gradually, and by insensible degrees, and to accommodate themselves to the temper of the people.[31]

Indeed, the juncture has been reached where advocates of EU primacy openly identify the emasculation of EU member states' sovereignty. U.N. Secretariat veteran Frederick K. Lister writes:

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[29]See Hitchens, *The Abolition of Britain*; and Roger Scruton, "Don't let Blair ruin it," *The Spectator* (April 1, 2000).

[30]Quoted in Wills, *A Necessary Evil*, pp. 76–77.

[31]Brutus, *Letter XV*, in Ketcham, *The Anti-Federalist Papers and the Constitutional Convention Debates*, p. 308.

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> The jurisprudence and judicial machinery of the European and the Benelux Unions constitute a new layer that is positioned between the international and national (municipal) legal systems. It is significant that the European Court of Justice . . . has had a heavy caseload and performed a role that is comparable to that played by the supreme courts in national governments.[32]

"But," as Wittgenstein asks, "what does all that signify?"[33] Let us examine one example of Eurocratic kritarchy's human costs.

The Bulger Case

> The British Government should not allow a European court to dictate how we operate our legal system.
> – Denise Furgus[34]

On February 12, 1993, Robert Thompson and Jon Venables abducted two-year-old James Bulger from a shopping center near Liverpool. They dragged him two-and-a-half miles to a railway line and tortured and battered the toddler to death. Cognizant of their barbaric act and apprehensive about capture, they placed his dead body on the railway line in the hopes that a train would hit it, making their savagery look like an accident. Their plan failed.[35]

Thompson and Venables, both 10 at the time of the murder, were tried as adults, convicted of murder in 1993, and sentenced to indefinite detention. The trial judge recommended a sentence of eight years, Lord Chief Justice Taylor increased it to ten years, and Home Secretary Michael Howard raised it to fifteen years. The House of Lords nullified Howard's increase in 1997.[36] In March 1999, the European

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[32]Frederick K. Lister, *The European Union, the United Nations, and the Revival of Confederal Governance* (Westport, Conn.: Greenwood Press, 1996), p. 45.

[33]Ludwig Wittgenstein, *Notebooks: 1914–1916*, 2nd ed., ed. G.H. von Wright and G.E.M. Anscombe (Chicago: University of Chicago Press, 1979), p. 47.

[34]Philip Johnston, "Bulger's killers had 'unfair trial'," *The Telegraph* (December 17, 1999). Fergus is James Bulger's mother.

[35]See *JamesBulger.org*; see also *Guardian Unlimited*, "The Bulger Case," www.guardianunlimited.co.uk/bulger.

[36]See Philip Johnston, "Lords quash 15-year jail minimum for Bulger pair," *The Telegraph* (June 13, 1997).

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Commission of Human Rights voted that Bulger's murderers were given an unfair trial in violation of Article 6 of the European Convention on Human Rights. The European Court of Human Rights affirmed this assessment in December, and ruled that Thompson and Venables deserved 18,000 and 32,000 pounds, respectively, for legal costs; it further ruled that the Home Secretary's discretion in sentencing Thompson and Venables was unlawful.[37] Home Secretary Jack Straw then referred the matter to Lord Chief Justice Woolf, who amended the murderers' sentence to a term that would summarily expire. On June 21, 2001, they were ordered released.[38]

In the Bulger case, we see the cultural wreckage that results from judicial interventionism exacerbated by the foreign nature of the intervening judiciary. To answer Wittgenstein's question, Eurocratic kritarchy means that domestic matters of the highest delicacy will be resolved not by domestic institutions, but by alien authorities transcendent of popular control. What this means is that English autonomy is at an end, and that centuries of political-cultural tradition are shells. It constitutes nothing less than the liquidation of a historical identity and an ontological fracture upon a people.

Conclusion

> Beware. Watch out. Be concerned. Courts can be dangerous and evil institutions in the hands of the wrong people. – Alan Dershowitz [39]

> Not only did he regard liberty as supremely important; he knew that it needs ceaseless defending. – A.J.P. Taylor, on Thomas Macaulay [40]

As a young political power, America is often counseled to learn from the experiences of other nations. When it comes to the course of federal unions, however, America has much to teach the world, and England in particular. The swift erosion of American federalism

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[37]See Terence Shaw, "The judgment: Trial breached killers' human rights," *The Telegraph* (December 17, 1999).

[38]See Sean O'Neill, "Bulger murderers to be released by the end of June," *The Telegraph* (April 27, 2001); also *JamesBulger.org*.

[39]Alan Dershowitz, remarks at New York University School of Law panel discussion of Richard North Patterson's *Protect and Defend*, Feb. 12, 2001.

[40]Quoted in Powell, *The Triumph of Liberty*, p. 261.

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into oligarchic rule by judges is being replicated and intensified in Europe.

Prescriptively, England should pursue a comprehensive campaign of devolution entailing withdrawal from the European Union and recognition of autonomy for those United Kingdom members desiring self-determination. Such a coherent strategy will promote freedom within the UK and undercut the EU's juridical juggernaut. Continued acquiescence to Eurocratic tyranny will only further reduce England and the rest of Europe to a colonial condition by this at once revolutionary and trite ontology.

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FROM THE BOSOM OF COMMUNISM TO THE CENTRAL CONTROL OF EU PLANNERS

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Since the end of the Second World War, the issue of European integration has taken on ever-greater economic and political importance. Upon communism's collapse in Eastern and Central Europe, a special new dimension was added to the process. The idea of building a united and integrated Europe by abolishing artificial state frontiers and creating conditions under which Europeans might live peaceful, happy lives remains attractive.

The problem, however, is that the Europe now emerging is far removed from this grand and noble idea. Two visions of Europe now conflict: on the one hand, there is the ideal of an *economically* united and integrated Europe to which I subscribe; on the other, its antithesis, a *politically* unified and centralized Europe. The best way to understand the full implications of how these visions differ is to remind ourselves of the crucial distinction between the notions of *state* and *society*.[1] Albert Jay Nock made this point clear:

> It is unfortunately none too well understood that, just as the State has no money of its own, so it has no power of

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[1]The distinction between political and economic means is developed in, e.g., Franz Oppenheimer, *The State: Its History and Development Viewed Sociologically*, trans. John M. Gitterman (New York: B.W. Huebsch, 1922); Murray N. Rothbard, *The Ethics of Liberty* (New York: New York University Press, 1998); and Wendy McElroy, "Defining *State* and *Society*," *The Freeman* 48, no. 4 (April 1998).

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> its own. All the power it has is what society gives it, plus what it confiscates from time to time on one pretext or another; there is no other source from which State power can be drawn. Therefore, every assumption of State power, whether by gift or seizure, leaves society with so much less power; there is never, nor can be, any strengthening of State power without corresponding and roughly equivalent depletion of social power.[2]

There is no doubt that European *society* would be greatly strengthened through the removal of artificial barriers to trade, capital and labor movement, among others. The quality of European life would improve dramatically if entrepreneurs were allowed to operate in markets covering the whole continent.[3] Fewer artificial barriers would mean that natural obstacles could be overcome more easily, and overcoming more obstacles would mean solving the basic economic problem, scarcity, more effectively.[4] This would also mean gaining more power over nature and furthering human progress, which is to say the process of civilization.[5]

Current European developments can, in contrast, be described as orchestrated political attempts to establish a European *state*. If statists have their way, this new state would be based upon the same devastating public policies, including regulation, taxation, and inflation, that have caused so much havoc in Eastern Europe over the last few decades. The only difference between the devastating policies of national states and the similarly devastating policies of one supranational European state is one of degree. The problems will not disappear; rather, their magnitude will escalate enormously. Revelation of the pernicious problems inherent in state policies, which will be conducted on the supernational rather than the national level, may be

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[2]Albert Jay Nock, *Our Enemy, the State* (New York: Free Life Editions, 1973), p. 3.

[3]It would be even better were they not limited by continental borders, and, thus, if free trade were extended worldwide.

[4]Frédéric Bastiat, *Economic Sophisms* (Irvington-on-Hudson, N.Y.: Foundation for Economic Education, 1996), chaps. 2–3.

[5]On this, see, e.g., Murray N. Rothbard, "Power over Nature and Power over Man," chap. 11b in *Power and Market*, 2nd ed. (San Francisco: Institute for Humane Studies, 1977); and Hans-Hermann Hoppe, "Time Preference, Government, and the Process of De-civilization: From Monarchy to Democracy," in *The Costs of War: America's Pyrrhic Victories*, ed. John V. Denson (New Brunswick, N.J.: Transaction, 1997).

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postponed; however, their solutions will be harsher than ever before. The day of reckoning cannot be avoided.

EUROPE IS ABOUT COMPETITION

Just as Europe may be difficult to define geographically, so, too, does it mean different things to different people. One thing is clear, however: the reason for Europe's relatively high standards of living is that it has traditionally entertained competition at all levels: competition between economic agents in the strict economic sense, between decentralised political units, between legal systems, between educational systems, and so on.[6] If there is such a thing as a "European Idea," it is that competition is the reason behind the unprecedented success and prosperity of Europe: the European Miracle. As Gerald Radnitzky argued,

> The secret of [Europe's] success was the diversity required for evolutionary competition. It led to the taming of the State, to respect for private rights, which in turn led to growth and wealth. Europe's great luck was that a centralised power did not emerge.[7]

Whenever Europe stuck to these traditional principles, and the power of European states remained limited, European *society* flourished as market forces of evolutionary competition did their valuable work. Whenever political struggles were set up and power-seeking politicians tried to attain political hegemony over European matters, the forces of social progress were converted into unproductive, wealth-destroying political conflicts, while the potential for general well-being was squandered on the political (and often military) battlefield. The machine of European progress has been crippled, and the eminent danger of its ultimate destruction by the continent-wide *state* has intensified. The concept of a European state has, thus, always been the enemy of European society.[8]

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[6]For more on positive effects of competition among legal systems, see Adam Smith, *An Inquiry into The Nature and Causes of The Wealth of Nations* (Indianapolis, Ind.: Liberty Classics, 1976), vol. 2, p. 720; and Boudewijn Bouckaert, "The Roots of our Liberties: On the Rise of Civil Society in the Medieval West," manuscript.

[7]Gerald Radnitzky, "European Integration: Evolutionary Competition Against Constructivist Design" (paper presented at the Mont Pèlerin Society Meeting, Munich, September, 1990), p. 4.

[8]A comprehensive analysis of the sources of European wealth and prosperity is beyond the scope of this paper. For such an exposition, see Hans-Hermann

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In the twentieth century, there were three major attempts to establish a European state, each stemming from distinct ideologies: (1) the pan-European Movement; (2) the Nazis; and (3) the EU. The first idea never really materialised,[9] and the Nazi attempt ended in failure.[10] The EU, on the other hand, is the most successful attempt to create a single European jurisdiction.[11]

The best way to understand the conflict between noble European rhetoric and what is actually taking place is to study the current effort of EU official bodies to re-regulate societies that just a few years ago freed themselves from the shackles of communism following the demise of the Soviet Union. Officials took many important steps, such as reducing many barriers to entry, including abolishing occupational licensing in certain sectors. In some cases, freer markets than existed in other parts of the world developed in some areas of Eastern Europe.

However, such reforms were far from perfect, generally consisting of moderate amounts of deregulation. As a result, post-communist

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Hoppe, "The Economic and Political Rationale for European Secessionism," in *Secession, State, and Liberty*, ed. David Gordon (New Brunswick, N.J.: Transaction, 1998); and Nathan Rosenberg and L.E. Birdzell, Jr., *How the West Grew Rich* (New York: Basic Books, 1985). Nonetheless, the commentary above will help with the discussion that follows.

[9]Some might claim, however, that it merged with the post-WWII "European movement." See the postscript to the pioneering work by the founder of the pan-European Movement, Richard N. Coudenhove-Kalergi, *Pan-Evropa* (Prague: Panevorpa, 1993). For a critique of the pan-European movement, see Ludwig von Mises, *Liberalism*, 3rd ed. (Irvington-on-Hudson, N.Y.: Foundation for Economic Education, 1985), pp. 142–47.

[10]For a stimulating debate on the Nazi sources of the EU idea, see John Laughland, *The Tainted Source: The Undemocratic Origins of the European Idea* (London: Warner Books, 1998).

[11]See Alan Sked, *Good Europeans*?, Bruges Group, Occasional Paper 4 (London, 1989); also Carlo Lottieri, "European Unification as the New Frontier of Collectivism," *Journal of Libertarian Studies* 16, no. 1 (Winter 2002). Lottieri identifies four superstitions or erroneous beliefs which underlie the attempts to create a new state called 'Europe': (1) individual liberty and juridical polycentrism cause tensions and, ultimately, wars; (2) the market results from the juridical order created by the State; (3) the existence of a distinct European identity calls for the construction of a single European state; and (4) a united Europe would be more harmonious and better able to support the development of poor societies, such as those of Eastern Europe.

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societies went from being completely state-run to being half-socialist, complete with high taxes and high inflation. The liberalisation did not last for long, as politicians, even those using free-market rhetoric, swiftly converted all post-communist countries (including the Czech Republic) into politicized societies where all but market virtues can be found.[12]

Post-communist countries made a terrible mistake: they decided that joining the new European superstate was their top political priority, thereby removing any hope of inaugurating a truly free society. With this fatal decision, all prospects for getting rid of political exploitation and rising above the heritage of communism were lost. After all, it makes no sense to discuss reforms when European political bodies now prefabricate everything.

EU advocates always seem to use the same argument, in either left-wing and right-wing versions, to trump their opponents. Leftists argue that "the EU wants us to enact this or that; don't you wish to become part of the EU, the embodiment of civilisation?" Rightists argue that "Although this measure or law is not very sensible, we have to implement it because it is what the EU demands. With a bit of luck, we might be able to postpone the application of this measure by two or three years. When we become part of the EU, we will have the opportunity to change the law. The EU is admittedly socialist, but do you know of any option other than to join?"

The following are examples of measures that the Czech Republic must adopt as its government prepares for EU membership.[13]

EU Propaganda

> In the years 2000–2002, total financial assistance to the Czech Republic will amount annually to EURO 79 million for PHARE. PHARE provides the applicant countries . . . with support for institution building, investment to strengthen the regulatory infrastructure needed to ensure compliance with the *acquis*, and investment in economic and social cohesion.

[12]See, e.g., Josef Šima and Dan Šťastný, "A Laissez-Faire Fable of the Czech Republic," *Journal of Libertarian Studies* 14, no. 2 (Summer 2000).

[13]The following quotations, unless otherwise cited, are from the Czech Republic, *Progress Toward Accession* (Prague, 2000). This is the most important political document relating to the Czech Republic's planned accession to the EU. See http://europa.eu.int/comm/enlargement/czech/index.htm.

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This program, according to the document, is especially focused on:

- ensuring that the Czech Republic is capable of applying internal market rules and regulations, in particular in areas such as data protection, finance, telecommunications, energy, and public procurement;
- preparing the Czech Republic for the Common Agricultural Policy, notably when it comes to the registration of agricultural assets;
- ensuring full compliance with the *acquis* relating to health and safety regulations; and
- strengthening the institutional and administrative capacity to manage the *acquis*, in particular in the areas of public administration and the compilation of statistics.

As a result of this influx of EU money, it has become "good business" to spend it. The flow of EU funds means that one can regularly find pro-EU propaganda supplements in several major Czech newspapers and journals. New, pro-EU masters degrees in social sciences have been launched and funded by EU subsidies; pro-EU high school programs have been introduced; and Brussels has funded a number of pro-EU books. Most recently, a pro-EU campaign using private radio stations, TV networks, and billboards has been launched.

Statistical Research

The EU has realised that to exercise control over a society, it needs to rely on statistical information. How else would Brussels bureaucrats know what to regulate? Money going to "institution building" in the field of statistics has started bringing fruits. According to official EU documents, "The Czech Republic has made considerable progress in the field of statistics. As regards statistical infrastructure, legislation is substantially aligned with the *acquis*."

Education and Training

The EU views the regulation of research and education as particularly important. The takeover of schools would prevent any unexpected changes or reforms, and would reaffirm the EU's grip on Czech society. In the eyes of EU statists, "civilization" equals "strict state regulation." As a first step, the EU says:

> Legislation on Research and Development should be adopted to harmonise the conditions for state support of

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> research and technological development with those of the EU. Legislation on Public Research Institutions should specify the legal status of these institutions and regulate their creation and liquidation. . . . In the field of education and training, an appropriate institutional framework is in place. It includes the Ministry of Education, Youth, and Sports (MoEYS), national institutions providing services related to education directly managed by the MoEYS.

The Media

After statistics, research, and education are under control, the next logical step must be to sort out the media. According to the EU,

> the Czech Republic has made some limited progress in aligning with the Community audio-visual *acquis*, which is a short-term priority of the Accession Partnership. As regards administrative capacity, the current competence and powers of the regulatory authority should be extended and its resources reinforced in view of the full implementation of the Community requirements. Particular importance should be attached to the establishment and strong supervision of a transparent and predictable regulatory framework in this field.

Bureaucracy

The EU wants life-long employment guaranteed for civil servants in order to "secure stability." The necessary result will be to make it impossible to remove thousands of bureaucrats, half of whom are inherited from communist times. This alone effectively rules out any possibility of radical reform.[14]

Tax Increases

The Czech ministry of finance argues in its two-year outlook that

> due to Czech accession to the EU, the Czech Republic must change its laws to align them with those of the EU. . . . According to data from 30 September 1999, EU tax policy includes 76 directives, 9 regulations, and 62 orders. Only 5 directives and 2 regulations have, at this stage, been completely incorporated. . . . It is, therefore, still necessary to:

[14]It should be noted in this context that the Czech Republic has more civil servants today than it had under communism.

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- Limit the number of goods for which the lower rate of VAT is applicable;
- Lower the threshold for compulsory registration for VAT;
- Increase excise taxes; and
- Shut down duty-free shops.

Although certain direct taxes may be lowered so as not to discourage foreign investors, the primary objective of fiscal policy is to stabilise (i.e., eliminate decreases in) overall levels of taxation. Lowering taxes to boost the private sector, as Ludwig Erhard did with great success in Germany after the Second World War, is out of the question.

Health and Safety Regulations

The adoption of EU health and safety standards irrespective of the wishes of the local workforce is making Czech firms uncompetitive. According to the EU, the "enforcement of legislation in areas such as occupational health and safety and public health is weak. As regards labour law, the Directive on Young People is only partially transposed."

Agriculture

Following EU demands that land be withdrawn from the market, the Ministry of Agriculture established a program to subsidise farmers who produce nothing. Farmers have, therefore, secured a monopolistic price for their products, with the EU providing money for the administration of the scheme. Of course, the grand redistributive scheme of the most wasteful EU common policy, the Common Agricultural Policy, is presented here as a demonstration of unidentified "European values" whose imitation will bring the country back to the "club of civilised nations."

Subsidised Milk

Czech bureaucrats have happily introduced even such insignificant and almost comical regulations as the "milk program for children in basic schools, high schools, and universities." The purpose of this regulation is apparently to promote "healthy drinking habits" and, as a result, subsidised milk is to be handed out even to university students.

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Barriers to Entry

Many occupations that formerly had no barriers to entry have been regulated, due to the EU's "civilisation procedure." Licenses are now needed to run "strategic" businesses, including hairdressing, animal training, and travel agents.

Burdensome Rules

Along with the rest of the EU, travel agencies, in addition to conforming to new license requirements, must now also purchase compulsory insurance, which has resulted in higher prices for customers.

Taxing Photocopies

Harmonisation of the "protection of property rights" has meant that, since January 2001, all firms that provide photocopying facilities for the general public have to pay an extra tax, to benefit the Association of Authors, for each photocopy its customers make. Apparently, this means that property rights are "safe."

Labour Markets

A harmonised labour code sets out not only a minimum wage but also compulsory breaks (every four hours) and limits to overtime, among other regulations. The state is increasingly protecting citizens against themselves.

Antidiscrimination

The EU also urges "antidiscrimination laws." The Czech Republic was chided in the most recent "evaluation report" for violating "human rights" because "despite the ban on all forms of discrimination against women, salaries for the same type of work remain approximately 25 percent lower than those of men," which is, to them, a clear sign that something must be done. The new law prohibiting this deficiency is to be a solution, says the EU report in the chapter titled "Economic, social, and cultural rights."

Financial Regulations

In the same report, the EU "suggests" that the Czech equivalent of the U.S.'s Securities and Exchange Commission increase the number of its employees to strengthen bureaucratic supervision of the financial market.

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Regulatory Madness

It is impossible to find a sector of the economy untouched by EU regulations. The EU "evaluation report" is full of the following sort of claims:

> The EC Directive on the Safety of Toys has now been transposed (from July 2000) but technical standards must be further aligned.
>
> The amendment to the Act on Fertilisers was also adopted.
>
> In the area of cosmetics. . . .
>
> As regards the banking sector, the Czech Republic needs to adopt the new Act on Banks.
>
> In the field of anti-trust . . . only limited progress has been achieved.
>
> Legislation regarding the control on imported fish needs to be adopted.

How were all these regulations adopted? They were simply taken, ready-made, from the EU, and translated into Czech. The mere task of translation presents a huge technical problem, although the EU is, of course, ready to help, and has willingly sponsored this absurd legal enterprise.

> Applicant countries are to translate the various legal texts constituting the *acquis* into their national languages by the time of their accession. The *acquis*, consisting of primary and secondary binding legislation, represents at present a considerable volume of acts, roughly estimated at 60,000–70,000 pages of the Official Journal.
>
> To help the candidate countries in this process, assistance is being provided under the PHARE programme . . . . As of June 2000, all documents of the primary legislation and about 28,000 pages of the secondary legislation have been translated, of which 10,000 have been fully revised. It is estimated that about 8,000 more pages will have been translated by the end of the year.
>
> With the consent of the Office for Official Publications in Luxembourg, approximately 200 of the revised documents have been displayed as working documents on the Internet, thus helping their implementation and general understanding in the public. . . . [However,] further efforts are required in this area.

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Conclusion

All in all, it is clear that Europe has been destroying the source of its prosperity. As Rosenberg and Birzdell wrote:

> Initially, the West's achievement of autonomy stemmed from a relaxation or a weakening of political and religious controls, giving other departments of social life the opportunity to experiment with change. Growth is, of course, a form of change, and growth is impossible when change is not permitted. And *successful* change requires a large measure of freedom to experiment. A grant of that kind of freedom costs a society's rulers their feeling of control, as if they were conceding to others the power to determine the society's future. A great majority of societies, past and present, have not allowed it. Nor have they escaped from poverty.[15]

The chance of experimentation with change is gone. As Rosenberg and Birzdell have rightly pointed out, European decentralisation was crucial for the development of our continent: "There was not one 'Empire, Inc.,' but a number of competing 'Monarchies, Inc.,' 'Princes, Inc.,' and 'City-States, Inc.'"[16]

Now we have it: the Euro-statists, obsessed with unlimited democracy, are setting up a huge and powerful superstate to regulate everything in sight, making the fight against this evil very difficult. It was relatively easy to drum up support to fight a dictatorial Europe with Hitler as its leader, because many regarded him as the embodiment of evil. Hitlerian political centralization of Europe was, therefore, avoided. The problem with the EU's attempt to politically centralise Europe is that it goes forth under the banners of human rights and democracy; both of which are perceived as the embodiments of goodness and civilization.

This sort of unlimited democracy is exactly the mechanism responsible for the destruction of property rights, the destruction of social power, and the rise of state power. As Anthony de Jasay states, "Under democracy, people are encouraged to try and get, by the political process, what the economic one denies them."[17] Indeed, one

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[15]Rosenberg and Birzdell, *How the West Grew Rich*, p. 34.

[16]Rosenberg and Birzdell, *How the West Grew Rich*, p. 136.

[17]Anthony de Jasay, *The State* (Indianapolis, Ind.: Liberty Fund, 1998), p. 284.

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cannot even speak out against such unlimited democracy without raising public outrage. As a result, power is quite easily channeled away from the people and toward the newly created EU authorities. In fact, due to the most recent Treaty of Nice, unanimity among states is no longer required, and democracy can start its operation on the EU level in more than 20 areas.

Bertrand de Jouvenel offered insight on this process:

> We no longer understand the process, we no longer protest, we no longer react. . . . Today as always, Power is in the hands of a group of men who control the power house. . . . All that has changed is that it has now been made easy for the ruled to change the personnel of the leading wielders of Power.
>
> Viewed from one angle, this weakens Power, because the wills which control a society's life can, at society's pleasure, be replaced by other wills, in which it feels more confidence. – But by opening the prospect of Power to all the ambitious talents, this arrangement makes the extension of Power much easier.
>
> Under the *ancien regime*, society's moving spirits, who had, as they knew, no chance of a share in Power, were quick to denounce its smallest encroachment. Now, on the other hand, when everyone is potentially a minister, no one is concerned to cut down an office to which he aspires one day himself, or to put sand in a machine which he means to use himself when his turn comes.[18]

As a result of this situation, countries of the former socialist bloc will find themselves deprived of the possibility of rapid dynamic development toward free and prosperous societies. The momentum behind radical reform following the collapse of the Soviet Union has been lost. With the "help" of the EU, the forces of statism are regaining ground: they have reestablished strict regulations, blocked the possibility of tax cuts, and helped establish a tenured class of state administrators, all in the name of democracy and human rights.

The result will be to relatively impoverish post-communist economies and trap them in the talons of the emerging EU Leviathan. A unique opportunity to move from the bosom of communism to a society based on property rights, individual responsibility, and freedom has, thus, been squandered.

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[18]Bertrand de Jouvenal, *On Power*, trans. J.F. Huntington (New York: Viking Press, 1949), pp. 9–10.

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NATURAL ORDER, THE STATE, AND THE IMMIGRATION PROBLEM

Hans-Hermann Hoppe*

I

Human cooperation is the result of three factors: the differences among men and/or the geographical distribution of nature-given factors of production; the higher productivity achieved under the division of labor based on the mutual recognition of private property (the exclusive control of every man over his own body and his physical appropriations and possessions) as compared to either self-sufficient isolation or aggression, plunder and domination; and the human ability to recognize this latter fact. Were it not for the higher productivity of labor performed under division of labor and the human ability to recognize this fact, explains Ludwig von Mises,

> men would have forever remained deadly foes of one another, irreconcilable rivals in their endeavors to secure a portion of the scarce supply of means of sustenance provided by nature. Each man would have been forced to view all other men as his enemies; his craving for the satisfaction of his own appetites would have brought him into an implacable conflict with all his neighbors. No sympathy could possibly develop under such a state of affairs.[1]

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[1]Ludwig von Mises, *Human Action: A Treatise on Economics* (Auburn, Ala.: Ludwig von Mises Institute, 1998), p. 144. "Within the frame of social cooperation," Mises explains, "there can emerge between members of society feelings of sympathy and friendship and a sense of belonging together. These feelings are the source of man's most delightful and most sublime experiences. However, they are not, as some have asserted, the agents that have

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The higher productivity achieved under the division of labor and man's ability to recognize this fact explain the origin of the most elementary and fundamental of human institutions: the family and the family household.[2] Second, it explains the fact of neighborhood (community) among homogeneous people (families, clans, tribes): of neighborhood in the form of adjacent properties owned by separate and "equal" owners and in the "unequal" form of the relationship characteristic of a father and his son, a landlord and his tenant, or a community founder and his follower-residents.[3] Third and most important for our purposes, it explains the possibility of the peaceful coexistence of heterogeneous and alien communities. Even if the members of different communities find each other physically and/or behaviorally strange, irritating, or annoying, and do not want to associate as neighbors, they may still engage in mutually beneficial trade if they reside spatially separated from each other.[4]

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brought about social relationships. They are fruits of social cooperation, they thrive only within its frame; they did not precede the establishment of social relations and are not the seed from which they spring."

[2]As regards the family, Mises explains, "the mutual sexual attraction between male and female is inherent in man's animal nature and independent of any thinking and theorizing. It is permissible to call it original, vegetative, instinctive, or mysterious. . . . However, neither cohabitation, nor what precedes it and follows, generates social cooperation and societal modes of life. The animals too join together in mating, but they have not developed social relations. Family life is not merely a product of sexual intercourse. It is by no means natural and necessary that parents and children live together in the way they do in the family. The mating relation need not result in a family organization. The human family is an outcome of thinking, planning, and acting." *Human Action*, p. 167.

[3]See on this also Spencer H. MacCallum, *The Art of Community* (Menlo Park, Calif.: Institute for Humane Studies, 1970).

[4]Mises notes in this regard that "even if such a thing as a natural and inborn hatred between various races existed, it would not render social cooperation futile. . . . Social cooperation has nothing to do with personal love or with a general commandment to love one another. They cooperate because this best serves their own interests. Neither love nor charity nor any other sympathetic sentiments but rightly understood selfishness is what originally impelled man to adjust himself to the requirements of society, to respect the rights and freedoms of his fellow men and to substitute peaceful cooperation for enmity and conflict." *Human Action*, p. 168.

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Let us broaden this picture and assume the existence of different races, ethnicities, languages, religions, and cultures (henceforth summarily: ethno-cultures). Based on the insight that "likes" associate with other likes and live spatially separated from "unlikes," the following picture emerges: People of one ethno-culture tend to live in close proximity to one another and spatially separated and distant from people of another ethno-culture. Whites live among Whites and separate from Asians and Blacks. Italian speakers live among other Italians and separate from English speakers. Christians live among other Christians and separate from Muslims. Catholics live among Catholics and separate from Protestants, etc. Naturally, some "overlap" and "mixing" of different ethno-cultures in various "border-territories" exists. Moreover, as centers of interregional trade, cities naturally display a higher degree of ethno-cultural heterogeneity. This notwithstanding, however, neighborhoods and communities are internally homogeneous (uni-cultural). In fact, even in border territories and cities the same spatial association and separation of likes and unlikes is found. Nothing like a society where members of different ethno-cultures live as neighbors or in close physical proximity to each other (as propagated by some American multiculturalists) emerges. Rather, the emerging multiculturalism is one in which many distinctly different ethno-cultures coexist in physical-spatial separation and distant from one another, and trade with each other from afar.[5]

Let us take one more step and assume that all property is owned privately and the entire globe is settled. Every piece of land, every house and building, every road, river, and lake, every forest and mountain, and all of the coastline is owned by private owners or firms. No such thing as "public" property or "open frontier" exists. Let us take a look at the problem of migration under this scenario of a "natural order."

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[5]See also Hans-Hermann Hoppe, *Democracy—The God That Failed: The Economics and Politics of Monarchy, Democracy, and Natural Order* (New Brunswick, N.J.: Transaction Publishers, 2001), esp. chap. 9.

On the significance of race and ethnicity, and especially on "genetic similarity and dissimilarity" as a source of attraction and repulsion see J. Phillippe Rushton, *Race, Evolution, and Behavior* (New Brunswick, N.J.: Transaction Publishers, 1995); idem, "Gene-Culture, Co-Evolution, and Genetic Similarity Theory: Implications for Ideology, Ethnic Nepotism, and Geopolitics," *Politics and the Life Sciences* 4 (1986); and Michael Levin, *Why Race Matters* (Westport, Conn.: Praeger, 1997).

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First and foremost, in a natural order, there is no such thing as "freedom of migration." People cannot move about as they please. Wherever a person moves, he moves on private property; and private ownership implies the owner's right to include as well as to exclude others from his property. Essentially, a person can move only if he is invited by a recipient property owner, and this recipient-owner can revoke his invitation and expel his invitees whenever he deems their continued presence on his property undesirable (in violation of his visitation code).

There will be plenty of movement under this scenario because there are powerful reasons to open access to one's property, but there are also reasons to restrict or close access. Those who are the most inclusive are the owners of roads, railway stations, harbors, and airports, for example. Interregional movement is their business. Accordingly, their admission standards can be expected to be low, typically requiring no more than the payment of a user fee. However, even they would not follow a completely non-discriminatory admission policy. For instance, they would exclude intoxicated or unruly people and eject all trespassers, beggars, and bums from their property, and they might videotape or otherwise monitor or screen their customers while on their property.

The situation for the owners of retail establishments, hotels, and restaurants is similar. They are in the business of selling and renting and thus offer easy access to their property. They have every economic incentive *not* to discriminate unfairly against "strangers" or "foreigners," because this would lead to reduced profits or losses. However, they must be significantly more circumspect and restrictive in their admission policy than the owners of roads or airports. They must take into account the local-domestic repercussions that the presence of strangers may have. If local-domestic sales suffer due to a retailer's or hotel's open admission policy vis-à-vis foreigners, then discrimination *is* economically justified. In order to overcome this possible problem, commercial establishments can be expected to require of their "foreign" visitors at a minimum adherence to local standards of conduct and appearance.[6]

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[6]On the law and economics of "affirmative action" and discrimination, see Richard A. Epstein, *Forbidden Grounds* (Chicago: University of Chicago Press, 1992); Walter Block and Michael Walker, eds., *Discrimination, Affirmative Action, and Equal Opportunity* (Vancouver, B.C.: Frazer Institute, 1982).

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The situation is similar for local employers. They prefer lower to higher wage rates; hence, they are not predisposed against foreigners. However, they must be sensitive to the repercussions on the local labor force that may result from the employment of foreigners; that is, they must be fearful of the possibility that an ethno-culturally heterogeneous work force might lead to lower productivity. Moreover, employment requires housing, and it is in the residential housing and real estate market where discrimination against and exclusion of ethno-cultural strangers will tend to be most pronounced. For it is in the area of *residential* as contrasted to commercial property where the human desire to be private, secluded, protected, and undisturbed from external events and intrusions is most pronounced. The value of residential property to its owner depends essentially on its almost total exclusivity. Only family members and occasionally friends are included. And if residential property is located in a neighborhood, this desire for undisturbed possession—peace and privacy—is best accomplished by a high degree of ethno-cultural homogeneity (as this lowers transaction costs while simultaneously increasing protection from external disturbances and intrusions). By renting or selling residential property to strangers (and especially to strangers from ethno-culturally distant quarters), heterogeneity is introduced into the neighborhood. Transaction costs tend to increase, and the peculiar peace-and-privacy-security—the freedom from external, foreign intrusions—sought and expected of residential property tends to fall, resulting in lower residential property values.[7]

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[7]Empirically, man's demand for ethno-cultural homogeneity in residential areas finds expression in two important institutional developments. On one hand, demand is accommodated by the development of proprietary communities—"gated" or "restrictive" communities or covenants—owned by a founder-developer and leased to follower-tenants. Here, from the outset, the owner imposes his own standards of community admission and membership conduct. The follower-tenants, in associating with the owner, agree to abide by this code. Of course, any such code restricts a person's range of permissible choices (as compared to the range available outside a proprietary community). By the same token, though, the code protects each community member from various forms of external disturbances. Presumably, in residing where they do community members demonstrate that they prefer the added "protection" offered by the code over its added "restrictiveness."

On the other hand, in communities of multiple independent proprietors, the demand for ethno-cultural homogeneity finds expression in the institution

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Under the scenario of a natural order, then, it can be expected that there will be plenty of interregional trade and travel. However, owing to the natural discrimination against ethno-cultural strangers in the area of residential housing and real estate, there will be little actual migration, i.e., permanent resettlement. And whatever little migration there is, it will be by individuals who are more or less completely assimilated to their newly adopted community and its ethno-culture.[8]

II

Let us now introduce the institution of a State. The definition of a State assumed here is rather uncontroversial: A State is an agency which possesses the exclusive monopoly of ultimate decision-making and conflict arbitration within a given territory. In particular, a State can insist that all conflicts involving itself be adjudicated by itself or its agents. Implied in the power to exclude all others from acting as ultimate judge, as the second defining element of a State, is its power to tax: to unilaterally determine the price justice seekers must pay to the State for its services as the monopolistic provider of law and order.[9]

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of insurance (mutual or capital based). The essence of insurance is the grouping of individual risks into a pool (or class) of risks. However, in order to be so grouped, each individual risk must be "homogeneous" as regards the risk under consideration to every other individual risk within the same class. "Heterogeneous" risks either cannot be insured or must be insured separately (in different pools, jointly with other homogeneous risks, and at different prices). Ethno-cultural homogeneity of neighborhoods, then, is simply a device for making insurance against external threats and interferences possible and thus lowering the cost of residential property protection. Homogeneity facilitates mutual property insurance. Capital-based insurers will charge lower premiums for clusters of homogeneous territories (while at the same time revealing the different ranks in cultural development of various ethno-cultures, as reflected in the price-spread of the premium charged at different locations.)

[8]Mass migration, in contrast to small-scale individual migration of skilled laborers in pursuit of a more productive environment, is entirely a State-made phenomenon (see also section IV below). Most typically, mass migration is the outcome of inter-State warfare, State resettlement programs, group expulsion, or general economic destructionism.

[9]See Murray N. Rothbard, *For A New Liberty* (New York; Macmillan, 1978), esp. chap. 3; Murray N. Rothbard, *The Ethics of Liberty* (New York: New York University Press, 1998), esp. part III; Hans-Hermann Hoppe, *A Theory*

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Certainly, based on this definition it is easy to understand why there might be a desire to establish a State. It is not, as we are told in kindergarten, in order to attain the "common good" or because there would be no order without a State, but for a reason far more selfish and base. For he who is a monopolist of final arbitration within a given territory can *make* and *create* laws in his own favor rather than recognize and apply existing law; and he who can legislate can also tax and thus enrich himself at the expense of others.

Here it is impossible to cover the fascinating question of how such an extraordinary institution as a State with the power to legislate and tax can possibly arise, except to note that ideologies and intellectuals play a decisive role.[10] Rather, States are assumed "given," and the changes as regards migration that result from their existence will be considered.

First, with the establishment of a state and territorially defined state borders, "immigration" takes on an entirely new meaning. In a natural order, immigration is a person's migration from one neighborhood-community into a different one (micro-migration). In contrast, under statist conditions immigration is immigration by "foreigners" from across state borders, and the decision whom to exclude or include, and under what conditions, rests not with a multitude of independent private property owners or neighborhoods of owners but with a single central (and centralizing) state-government as the ultimate sovereign of all domestic residents and their properties (macro-migration). If a domestic resident-owner invites a person and arranges for his access onto the resident-owner's property but the government excludes this person from the state territory, it is a case of *forced exclusion* (a phenomenon that does not exist in a natural order). On the other hand, if the government admits a person while there is no domestic resident-owner who has invited this person onto his property, it is a case of *forced integration* (also non-existent in a natural order, where all movement is *invited*).

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of Socialism and Capitalism (Boston: Kluwer 1989); also Franz Oppenheimer, *The State* (New York: Vanguard Press, 1914).

[10]See Hoppe, *Democracy—The God That Failed*; idem, "Natural Elites, Intellectuals, and the State," (Auburn, Ala.: Ludwig von Mises Institute Pamphlet, 1995); Murray N. Rothbard, *For A New Liberty*, esp. chap. 7; idem, *Education: Free & Compulsory* (Auburn, Ala.: Ludwig von Mises Institute, 1999).

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III

In order to comprehend the significance of this change from decentralized admission by a multitude of property owners and owner-associations (micro-migration) to centralized admission by a state (macro-migration), and in particular to grasp the potentialities of forced integration under statist conditions, it is necessary first to briefly consider a state's policy of *domestic* migration. Based on the state's definition as a territorial monopolist of legislation and taxation and the assumption of "self-interest," the basic features of its policy can be predicted.

Most fundamentally, it can be predicted that the state's agents will be interested in increasing (maximizing) tax revenues and/or expanding the range of legislative interference with established private property rights, but they will have little or no interest in actually doing what a state is supposed to do: protecting private property owners and their property from domestic and foreign invasion.

More specifically, because taxes and legislative interference with private property rights are not paid voluntarily but are met with resistance, a state, to assure its own power to tax and legislate, must have an existential interest in providing its agents access to everyone and all property within the state's territory. In order to accomplish this, a state must take control of (expropriate) all existing private roads and then use its tax revenue to construct more and additional "public" roads, places, parks and lands, until everyone's private property borders onto or is encircled by public lands and roads.

Many economists have argued that the existence of public roads indicates an imperfection of the natural—free market—order. According to them, the free market "under-produces" the so-called "public" good of roads; and tax-funded public roads rectify this deficiency and enhance overall economic efficiency (by facilitating interregional movement and trade and lowering transaction costs). Obviously, this is a starry-eyed view of the situation.[11]

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[11]On the fallacies of the theory of public goods see Murray N. Rothbard, *Man, Economy, and State* (Auburn, Ala.: Ludwig von Mises Institute, 1993), pp. 883–90; Hoppe, *A Theory of Socialism and Capitalism*, chap. 10; on roads in particular see Walter Block, "Public Goods and Externalities: The Case of Roads," *Journal of Libertarian Studies* 7, no. 1 (1983).

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Free markets *do* produce roads, although they may well produce fewer and different roads than under statist conditions. And viewed from the perspective of a natural order, the increased production of roads under statist conditions represents not an improvement but an "over-production" or better yet "mal-production" of roads. Public roads are not simply harmless facilitators of interregional exchange. First and foremost, they are facilitators of state taxation and control, for on public roads the government's taxmen, police, and military can proceed directly to everyone's doorstep.[12]

In addition, public roads and lands lead to a distortion and artificial break-up of the spatial association and separation characteristic of a natural order. As explained, there are reasons to be close and inclusive, but there are also reasons to be physically distant and separated from others. The over-production of roads occurring under statist conditions means on the one hand that different communities are brought into greater proximity to one another than they would have preferred (on grounds of demonstrated preference). On the other hand, it means that one coherent community is broken up and divided by public roads.[13]

Moreover, under the particular assumption of a *democratic* state even more specific predictions can be made. Almost by definition, a state's territory extends over several ethno-culturally heterogeneous communities, and dependent on recurring popular elections, a state-government will predictably engage in redistributive policies.[14] In an ethno-culturally mixed territory this means playing one race, tribe, linguistic or religious group against another; one class within any one of these groups against another (the rich vs. the poor, the capitalists vs. the workers, etc.); and finally, mothers against fathers and children against parents. The resulting income and wealth redistribution is complex and varied. There are simple transfer payments from one

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[12]Even the famed roadways of ancient Rome were typically regarded as a *plague* (rather than an advantage) because they were essentially military rather than trade routes. See Max Weber, *Soziologie, Weltgeschichtliche Analysen, Politik* (Stuttgart: Kroener, 1964), p. 4.

[13]See also Edward Banfield, *The Unheavenly City Revisited* (Boston: Little, Brown, 1974).

[14]On the practical impossibility of democracy (majority rule) in multi-ethnic states, see Ludwig von Mises, *Nation, State, and Economy* (New York: New York University Press, 1983).

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group to another, for instance. However, redistribution also has a spatial aspect. In the realm of spatial relations it finds expression in an ever more pervasive network of non-discriminatory "affirmative action" policies imposed on private property owners.

An owner's right to exclude others from his property is the means by which he can avoid "bads" from happening: events that will lower the value of his property. By means of an unceasing flood of redistributive legislation, the democratic state has worked relentlessly not only to strip its citizens of all arms (weapons) but also to strip domestic property owners of their right of exclusion, thereby robbing them of much of their personal and physical protection. Commercial property owners such as stores, hotels, and restaurants are no longer free to exclude or restrict access as they see fit. Employers can no longer hire or fire who they wish. In the housing market, landlords are no longer free to exclude unwanted tenants. Furthermore, restrictive covenants are compelled to accept members and actions in violation of their very own rules and regulations. In short, forced integration is ubiquitous, making all aspects of life increasingly uncivilized and unpleasant.[15]

IV

With this backdrop of domestic state policies we can return to the problem of immigration under statist conditions. It is now clear what state admission implies. It does not merely imply centralized admission. By admitting someone onto its territory, the state also permits this person to proceed on public roads and lands to every domestic resident's doorsteps, to make use of all public facilities and services (such as hospitals and schools), and to access every commercial establishment, employment, and residential housing, protected by a multitude of non-discrimination laws.[16]

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[15]See also Murray N. Rothbard, "Marshall, Civil Rights and the Courts," in Llewellyn H. Rockwell, Jr., ed., *The Irrepressible Rothbard* (Burlingame, Calif.: Center for Libertarian Studies, 2000), pp. 370–77; Michael Levin, "The President as Social Engineer," in John V. Denson, ed., *Reassessing the Presidency* (Auburn, Ala.: Ludwig von Mises Institute, 2001), pp. 651–66.

[16]"If every piece of land in a country were owned by some person, group or corporation," elaborates Murray N. Rothbard, "this would mean that no immigrant could enter unless invited to enter and allowed to rent or purchase property. A totally privatized country would be as closed as the particular inhabitants and property owners desire. It seems clear, then, that the regime

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Only one more element is missing in this reconstruction. Why would *immigration* ever be a problem for a state? Who would want to migrate from a natural order into a statist area? A statist area would tend to lose its residents, especially its most productive subjects. It would be an attraction only for potential state-welfare recipients (whose admission would only further strengthen the emigration tendency). If anything, *emigration* is a problem for a State. In fact, the institution of a State is a *cause* of emigration; indeed, it is the most important or even the sole cause of modern *mass* migrations (more powerful and devastating in its effects than any hurricane, earthquake or flood and comparable only to the effects on migration of the various ice-ages).

What has been missing in this reconstruction is the assumption of a multitude of states partitioning the entire globe (the absence of natural orders anywhere). Then, as one state causes mass emigration, another state will be confronted with the problem of mass immigration; and the general direction of mass migration movements will be from territories where states exploit (legislatively expropriate and tax) their subjects more (and wealth accordingly tends to be lower) to territories where states exploit less (and wealth is higher).

We have finally arrived in the present, when the Western world —Western Europe, North America, and Australia—is faced with the specter of State-caused mass immigration from all over the rest of the world. What can and is being done about this situation?

Out of sheer self-interest States will not adopt an "open border" policy. If they did, the influx of immigrants would quickly assume such proportions that the domestic state-welfare system would collapse. On the other hand, the Western welfare states do not prevent tens or even hundreds of thousands (and in the case of the United States well in excess of a million) of uninvited foreigners per year from entering and settling their territories. Moreover, as far as legal

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of open borders that exists *de facto* in the U.S. really amounts to a compulsory opening by the central state, the state in charge of all streets and public land areas, and does not genuinely reflect the wishes of the proprietors." "Nations by Consent: Decomposing the Nation-State," *Journal of Libertarian Studies* 11, no. 2 (1994), p. 7. On U.S. immigration, see Peter Brimelow, *Alien Nation: Common Sense About America's Immigration Disaster* (New York: Random House, 1995); George J. Borjas, *Friends or Strangers: The Impact of Immigrants on the U.S. Economy* (New York: Basic Books, 1990); idem, *Heaven's Door: Immigration Policy and the American Economy* (Princeton, N.J.: Princeton University Press, 1999).

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(rather than tolerated illegal) immigration is concerned, the Western welfare states have adopted a non-discriminatory "affirmative action" admission policy. That is, they set a maximum immigration target and then allot quotas to various emigration countries or regions, irrespective of how ethno-culturally similar or dissimilar such places and regions of origin are, thus further aggravating the problem of forced integration. As well, they typically allow an "open" (unspecified) number of "political asylum" seekers to enter—of government approved "victim" groups (and at the exclusion of other, "politically incorrect" victims).[17]

In light of the unpopularity of this policy, one might wonder about the motive for engaging in it. However, given the nature of the state it is not difficult to discover a rationale. States, as will be recalled, are also promoters of forced domestic integration. Forced integration is a means of breaking up all intermediate social institutions and hierarchies (in between the state and the individual) such as family, clan,

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[17]Typically, it is easier for a certified "political" mass murderer, such as a socialist dictator, for instance, who has been overthrown by another, to gain entrance into Western countries than it is for the (his) "true" victims.

While he who qualifies as a victim changes with the political winds, a relative constant in Western asylum policy is the preference for Jewish immigration (at the exclusion of non-Jews). In the U.S., for instance, it has been a long-standing tradition that Jews from the former Soviet Union qualify as "victims," while regular Russians or Ukrainians do not. Not to be outdone, Germany currently accepts every Russian Jew who desires entrance, but excludes as non-victims all other Russians. Consequently, the demand for German asylum among Russian "Jews," two thirds of whom are supported entirely through "public" welfare, has risen to such a level that the Central Committee of Jews in Germany demanded of the German government (successfully) that applicants be "tested" for Jewishness. Essentially, the test is the same as that employed by the National Socialists in the infamous Nuremberg Race Laws of 1934 (while it is used to the opposite effect), which in turn was based on the official (self-acknowledged) religious strictures of orthodox Judaism. Incidentally, Israel, which defines itself as "a Jewish State," practically prohibits all immigration by non-Jews (while allowing any Jew from anywhere, under the Law of Return, to enter Israel with full citizenship rights). Ninety-two percent of Israel's land is state-owned and regulated by the Jewish National Fund. According to its regulations, the right to reside, to open a business, and frequently also to work on this land is prohibited to anyone except Jews. While Jews may rent from non-Jews, non-Jews are prohibited from renting from Jews. See Israel Shahak, *Jewish History, Jewish Religion* (London: Pluto Press, 1994), esp. chap. 1.

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tribe, community, and church and their internal layers and ranks of authority. Through forced integration individuals are isolated (atomized) and their power of resistance vis-à-vis the State is weakened.[18] In the "logic" of the state, a hefty dose of foreign invasion, especially if it comes from strange and far-away places, is reckoned to further strengthen this tendency. And the present situation offers a particularly opportune time to do so, for in accordance with the inherently centralizing tendency of States and statism generally and promoted here and now in particular by the U.S. as the world's only remaining superpower, the Western world—or more precisely the neoconservative-socialdemocratic elites controlling the state governments in the U.S. and Western Europe—is committed to the establishment of supra-national states (such as the European Union) and ultimately one world state. National, regional or communal attachments are the main stumbling blocks on the way to this goal. A good measure of uninvited foreigners and government imposed multiculturalism is calculated to further weaken and ultimately destroy national, regional, and communal identities and thus promote the goal of a One World Order, led by the U.S., and a new "universal man."[19]

V

What if anything can be done to spoil these statist designs and regain security and protection from invasion, whether domestic or foreign? Let us begin with a proposal made by the editors of the *Wall Street Journal*, the Cato Institute, the Foundation for Economic Education, and various left-libertarian writers of an "open" or "no" border policy—not because this proposal has any merit, but because it helps to elucidate what the problem is and what needs to be done to solve it.

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[18]See also Robert A. Nisbet, *Community and Power* (New York: Oxford University Press, 1962; idem, *Conservatism* (Minneapolis: University of Minnesota Press, 1986).

[19]For a summary presentation of the neoconservative worldview, see Francis Fukuyama, *The End of History and the Last Man* (New York: Avon Books, 1993); for a critical assessment of the neoconservatives and their agenda, see Paul Gottfried, *The Conservative Movement* (New York: Twayne Publishers, 1993); idem, *After Liberalism* (Princeton, N.J.: Princeton University Press, 1999). For a brilliant literary treatment of the subject of mass immigration and the Western welfare state, see Jean Raspail, *The Camp of the Saints* (New York: Charles Scribner's Sons, 1975).

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It is not difficult to predict the consequences of an open border policy in the present world. If Switzerland, Austria, Germany or Italy, for instance, freely admitted everyone who made it to their borders and demanded entry, these countries would quickly be overrun by millions of third-world immigrants from Albania, Bangladesh, India, and Nigeria, for example. As the more perceptive open-border advocates realize, the domestic state-welfare programs and provisions would collapse as a consequence.[20] This would not be a reason for concern, for surely, in order to regain effective protection of person and property the welfare state must be abolished. But then there is the great leap—or the gaping hole—in the open border argument: out of the ruins of the democratic welfare states, we are led to believe, a new natural order will somehow emerge.

The first error in this line of reasoning can be readily identified. Once the welfare states have collapsed under their own weight, the masses of immigrants who have brought this about are still there. They have not been miraculously transformed into Swiss, Austrians, Bavarians or Lombards, but remain what they are: Zulus, Hindus, Ibos, Albanians, or Bangladeshis. Assimilation can work when the number of immigrants is small. It is entirely impossible, however, if immigration occurs on a mass scale. In that case, immigrants will simply transport their own ethno-culture onto the new territory. Accordingly, when the welfare state has imploded there will be a multitude of "little" (or not so little) Calcuttas, Daccas, Lagoses, and Tiranas strewn all over Switzerland, Austria, and Italy. It betrays a breathtaking sociological naiveté to believe that a natural order will emerge out of this admixture. Based on all historical experience with such forms of multiculturalism, it can safely be predicted that in fact the result will be civil war. There will be widespread plundering and squatterism leading to massive capital consumption, and civilization as we know it will disappear from Switzerland, Austria and Italy. Furthermore, the host population will quickly be outbred and, ultimately, physically displaced by their "guests." There will still be Alps in Switzerland and Austria, but no Swiss or Austrians.[21]

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[20]See, for instance, Walter Block, "A Libertarian Case for Free Immigration," *Journal of Libertarian Studies* 13, no. 2 (1998).

[21]Peter Brimelow, *Alien Nation*, pp. 124–27, has provided some recent evidence for the thesis that no multicultural state, and especially no democratic one, has ever worked peacefully for very long. Working back from the present,

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However, the error in the open border proposal goes further than its dire consequences. The fundamental error of the proposal is moral or ethical in nature and lies in its assumption. It is the underlying assumption that foreigners are "entitled," or have a "right," to immigrate. In fact, they have no such right whatsoever.

Foreigners would have a right to enter Switzerland, Austria or Italy only if these places were uninhabited (unowned) territories. However, they *are* owned, and no one has a right to enter territories that others own unless invited by the owner. Nor is it permissible to argue, as some open border proponents have done, that while foreigners may

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here is the evidence: *Eritrea*, ruled by Ethiopia since 1952, splits off in 1993; *Czechoslovakia*, founded in 1918, splits into Czech and Slovak ethnic components in 1993; the *Soviet Union* of 1917 splits into multiple ethnic components in 1991, and many of these components are threatened with further ethnic fragmentation; *Yugoslavia*, founded in 1918, splits into several ethnic components in 1991, and further breakup is still under way; *Lebanon*, founded in 1920, has effectively partitioned Christians and Muslims (under Syrian domination) since 1975; *Cyprus*, independent since 1960, effectively partitions Greek and Turkish territories in 1974; *Pakistan*, independent since 1947, ethnically distinct Bangladesh splits off in 1971; *Malaysia*, independent since 1963, Chinese-dominated Singapore is expelled in 1965. The list goes on with still unresolved cases: *India* and the Sikhs and Kashmiris; *Sri Lanka* and the Tamils; *Turkey, Iraq* and *Iran* and the Kurds; *Sudan* and *Chad* and the Arabs versus Blacks; *Nigeria* and the Ibos; *Ulster* and the Protestants versus the Catholics; *Belgium* and the Flemish versus the Walloons; *Italy* and the German-speaking South Tyrolians; *Canada* and the French versus the English; *Zimbabwe* and *South Africa* and Blacks versus Whites.

Yet, is not Switzerland, with an assemblage of Germans, French, Italians, and Romansh an exception? Hardly. All essential powers in Switzerland, in particular those determining educational and cultural matters (schools), are concentrated in the hands of the cantons rather than in those of the central government. And almost all of the twenty-six cantons and half-cantons are ethno-culturally homogeneous. Seventeen cantons are almost exclusive German; four cantons are almost exclusively French; and one canton is predominantly Italian. Only three cantons are bilingual, the Swiss ethno-cultural balance has been essentially stable, and there is only a limited amount of inter-cultural-cantonal migration. Even given these favorable circumstances, Switzerland did experience an unsuccessful, violently suppressed war of secession, the Sonderbundskrieg of 1847. Furthermore, the creation of the new, breakaway French-speaking canton of Jura from the predominantly German canton of Berne in 1979 was preceded by years of terrorist activity.

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not enter *private* property without the owner's permission they may do so with *public* property. In their eyes, public property is akin to unowned property and thus "open" to everyone, domestic citizen and foreigners alike.[22] However, this analogy between public property and unowned resources is wrong. There is a categorical difference between unowned resources (open frontier) and public property. Public property is the result of State-government confiscations—of legislative expropriations and/or taxation—of originally privately owned property. While the State does not *recognize* anyone as its private owner, all of government controlled public property has in fact been brought about by the tax-paying members of the domestic public. Austrians, Swiss, and Italians, in accordance with the amount of taxes paid by each citizen, have funded the Austrian, Swiss, and Italian public property. Hence, *they* must be considered its legitimate owners. Foreigners have not been subject to domestic taxation and expropriation; hence, they cannot claim any rights regarding Austrian, Swiss or Italian public property.

The recognition of the moral status of public property as expropriated private property is not just sufficient grounds for rejecting the open border proposal as a moral outrage. It is equally sufficient for combating the present semi-open "affirmative action" immigration policies of the Western welfare States.

Up to now, in the debate on immigration policy too much emphasis has been placed on consequentialist (utilitarian) arguments. Apologists of the *status quo* have argued that most immigrants work and become productive, so immigration contributes to a rising domestic standard of living. Critics have argued that the existing State-welfare institutions and provisions increasingly invite welfare-immigration, and they have warned that the only advantage of the current policies over the open border alternative is that the former will take decades until it ultimately leads to similarly dire effects, while the latter will produce such effects within years. As important as the resolution of these issues is, it is not decisive. The opposition against current immigration policies is ultimately independent of whether immigration will make per capita GDP (or similar statistical measures) rise or fall. It is a matter of justice: of right and wrong.

Understandably, the democratic welfare States try to conceal the *source* of public property (i.e., acts of expropriation). However, they

[22]See, for instance, Block, "A Libertarian Case for Free Immigration."

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do acknowledge that public property is "somehow" the property of their citizens and that they are the citizens' trustees in regard to public property. Indeed, the modern State's *legitimacy* is derived from its claim to protect its citizens and their property from domestic and foreign invaders, intruders, and trespassers. Regarding foreigners, this would require that the state act like the gatekeepers in private gated communities. The State would have to check every newcomer for an invitation and monitor his movement while en route to his final destination. Once it is made clear that the government actually tolerates or even promotes the intrusion and invasion of masses of aliens who by no stretch of the imagination can be deemed welcome or invited by domestic residents, this is or may become a threat to a government's legitimacy and exert enough pressure on it to adopt a more restrictive and discriminatory admission policy.[23]

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[23]Against many left-libertarian open border enthusiasts, it is incorrect to infer from the fact that an immigrant has found someone willing to employ him that his presence on a given territory must henceforth be considered "invited." Strictly speaking, this conclusion is true only if the employer also assumes the full costs associated with the importation of his immigrant-employee. This is the case under the much-maligned arrangement of a "factory town" owned and operated by a proprietor. Here, the full cost of employment, the cost of housing, healthcare, and all other amenities associated with the immigrant's presence, is paid for by the proprietor. No one else's property is involved in the immigrant-worker settlement. Less perfectly (and increasingly less so), this full-cost-principle of immigration is realized in Swiss immigration policy. In Switzerland immigration matters are decided on the local rather than federal government level, by the local owner-resident community in which the immigrant wants to reside. These owners are interested that the immigrant's presence in their community increase rather than decrease their property values. In places as attractive as Switzerland, this typically means that the immigrant (or his employer) is expected to buy his way into a community, which often requires multimillion dollar donations.

Unfortunately, welfare states are not operated like factory towns or even Swiss communities. Under welfare-statist condition the immigrant employer must pay only a small fraction of the full costs associated with the immigrant's presence. He is permitted to socialize (externalize) a substantial part of such costs onto other property owners. Equipped with a work permit, the immigrant is allowed to make free use of every public facility: roads, parks, hospitals, schools, and no landlord, businessman, or private associated is permitted to discriminate against him as regards housing, employment, accommodation, and association. That is, the immigrant comes invited with a substantial fringe

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benefits package paid for not (or only partially) by the immigrant employer (who allegedly has extended the invitation), but by other domestic proprietors as taxpayers who had no say in the invitation whatsoever. This is not an "invitation," as commonly understood. This is an imposition. It is like inviting immigrant workers to renovate one's own house while feeding them from other people's refrigerators. Consequently, because the cost of importing immigrant workers is lowered, more employer-sponsored immigrants will arrive than otherwise. Moreover, the character of the immigrant changes, too. While Swiss communities choose well-heeled, highly value-productive immigrants, whose presence enhances communal property values all-around, employers under democratic welfare State conditions are permitted by state law to externalize their employment costs on others and tend to import increasingly cheap, low-skilled and low value-productive immigrants, regardless of their effect on all-around communal property values.

Theoretically bankrupt, the left-libertarian open border stance can be understood only psychologically. One source can be found in the Randian upbringing of many left-libertarians. Big businessmen-entrepreneurs are portrayed as "heroes" and, according to Ayn Rand in one of her more ridiculous statements, are viewed as the welfare state's "most severely persecuted minority." In this view (and untainted by any historical knowledge or experience), what can possibly be wrong with a businessman hiring an immigrant worker? In fact, as every historian knows, big businessmen are among the worst sinners against private property rights and the law of the market. Among other things, in an unholy alliance with the central State they have acquired the privilege of importing immigrant workers at other people's expense (just as they have acquired the privilege of exporting capital to other countries and being bailed out by taxpayers and the military when such investments turn sour).

A second motive for the open border enthusiasm among contemporary left-libertarians is their egalitarianism. They were initially drawn to libertarianism as juveniles because of its "antiauthoritarianism" (trust no authority) and seeming "tolerance," in particular toward "alternative"—non-bourgeois—lifestyles. As adults, they have been arrested in this phase of mental development They express special "sensitivity" in every manner of discrimination and are not inhibited in using the power of the central state to impose nondiscrimination or "civil rights" statutes on society. Consequently, by prohibiting other property owners from discrimination as they see fit, *they* are allowed to live at others' expense. They can indulge in their "alternative" lifestyle without having to pay the "normal" price for such conduct, i.e., discrimination and exclusion. To legitimize this course of action, they insist that one lifestyle is as good and acceptable as another. This leads first to multiculturalism, then to cultural relativism, and finally to "open borders." See further on this Hoppe, *Democracy—The God That Failed*, esp. chap. 10.

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But this can only be the beginning; even if public opinion induced the state to adopt an immigration stance more in accordance with popular sentiments and justice, this fact would not change that the interests of private property owners and those of the State as a territorial monopolist of legislation and taxation are incompatible and in permanent conflict with each other. A State is a contradiction in terms: it is a property protector who may expropriate the property of the protected through legislation and taxation. Predictably, a State will be interested in maximizing its tax revenues and power (its range of legislative interference with private property rights) and disinterested in protecting anything except itself. What we experience in the area of immigration is only one aspect of a general problem. States are also supposed to protect their citizen from domestic intrusion and invasion, yet as we have seen, they actually disarm them, encircle them, tax them, and strip them of their right to exclusion, thus rendering them *helpless*.

Accordingly, the solution to the immigration problem is at the same time the solution to the general problem inherent in the institution of a State and of public property. It involves the return to a natural order by means of secession. To regain security from domestic and foreign intrusion and invasion, the central nation States will have to be broken up into their constituent parts. The Austrian and the Italian central States do not own Austrian and Italian public property; they are its citizens' trustees. Yet they do not protect them and their property. Hence, just as the Austrians and the Italians (and not foreigners) are the owners of Austria and Italy, so by extension of the same principle do the Carinthians and the Lombards (in accordance with individual tax payments) own Carinthia and Lombardy, and the Bergamese Bergamo (and not the Viennese and the Roman governments).

In a decisive first step, individual provinces, regions, cities, towns and villages must declare their independence from Rome, Vienna, Berlin, Paris, and proclaim their status as "free territories." Extensive efforts by the central States to the contrary notwithstanding, strong provincial affiliations and attachments still exist in many regions, cities and villages all across Europe. It is vital to tap into these provincial and local sentiments in taking this first step. With every successive act of regional secession the power of the central State will be diminished. It will be stripped of more of its public property, its agents' range of access will increasingly be restricted, and its laws will apply in smaller and smaller territories, until it ultimately withers away.

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However, it is essential to go beyond "political secession" to the *privatization* of property. After all, provincial and local political bodies (governments) have no more right to provincial property than the central government had to national property. The secession process must proceed further. Provincial or communal public property: roads, parks, government buildings, schools, courthouses, etc., must be returned to their genuine *private* owners and owner associations. Who owns what share of provincial or communal property? In principle, each owns according to his (compulsory) contribution to this property! In the case in which private property was expropriated by local government for purposes of "eminent domain," the property is simply returned to its original owner. As for the rest (and most) of public property, tradable property shares should be distributed among community members in accordance with their individual tax-payments. Every public road, park, school, etc., was funded by taxpayers; hence, local taxpayers, in accordance with their tax payments, should be awarded local public property.[24] This has a twofold implication. First, some residents have paid more taxes than others, so it is only natural and just that the former should be awarded more shares than the latter. Second and more specifically, some residents will be excluded altogether from receiving public property shares. For one, welfare recipients should be excluded. Presumably, they have paid no taxes but lived instead on taxes paid by others. Hence, they cannot claim any ownership share in public property. Likewise, all government officials and civil servants must be excluded from receiving ownership shares in public property, for their net (after tax) salary has been paid out of taxes paid by others. Just like welfare recipients, civil servants have not been tax-*payers* but tax-*consumers*. Hence, they too have no claim to communal property.[25]

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[24]It should be emphasized that the distributed property shares must be *tradable* in order to constitute genuine *private* property. On the one hand, the tradability of shares makes it possible that people can cash-in (sell) their property. Not everyone has the patience and is willing to assume the risk associated with the ownership of capital goods. On the other hand, by the same token tradability makes it possible that the shares can be bought and put to productive use by capitalist-entrepreneurs who do have the requisite patience and are willing to assume the associated risk (of profit *and* loss).

[25]To be sure, a number of complications would arise with this privatization strategy. In order to determine the ownership shares granted to various individuals in buildings and structures currently owned by federal, regional, and

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With the central state withered away and the privatization of public property complete, the right to exclusion inherent in private property and essential for personal security and protection is returned into the hands of a multitude of independent private decision-making units. Immigration once again becomes a micro-phenomenon and disappears as a social "problem."

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local governments, these individuals would have to provide documentation of their past payments of federal, regional and local taxes respectively, and in each case past welfare payments received must be deducted from taxes paid in order to arrive at a figure for the amount of *net* taxes paid. In a fully privatized market society, the task of finding a detailed solution to this problem would be typically assumed by private accountants, lawyers, and arbitration agencies, financed directly or indirectly, for a contingency fee, by the individual claimants.

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BOOK REVIEWS

Edited by N. Stephan Kinsella*

HERNANDO DE SOTO. *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE.* NEW YORK: BASIC BOOKS, 2000. PP. 276.

Why capitalism triumphs in the West and fails everywhere else is the question that Hernando de Soto, the acclaimed author of *The Other Path*,[1] tries to answer in *The Mystery of Capital*. To be sure, the question is not new; the world's libraries are filled with books which claim to answer it. Indeed, there is a glut of books claiming that the continued existence of poverty ("underdevelopment" is the technical, fashionable word in the economics jargon) is the result of such factors as culture, religion, geography, meteorology, human greed, and lack of entrepreneurship.

However, books claiming that the problem is the lack of respect for private property rights are as scarce as a cup of water in the desert. De Soto's new work should attract the attention of every libertarian reader because it is one such cup of water. However, as I will explain, drinking from de Soto's cup is not always refreshing.

The author points out that capitalism has failed in the third world and former communist countries because of the lack of easy access to formal property. In fact, a huge part of their populations deal with so many legal barriers to formal recognition of their property (the scarce resources over which they have control) that their alternatives

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[1]Hernando de Soto, *The Other Path: The Invisible Revolution in the Third World* (New York: Harper & Row, 1989).

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are either resignation or entry into the informal extralegal sector (the black market). In de Soto's book, the black market is a promising fountainhead of solutions (p. 88), rather than a source of guilt for the problems of poverty.

As examples of these legal barriers, it took de Soto´s team in Peru six years and eleven months, and 207 administrative steps in fifty-two different governmental offices, to obtain legal authorization to build a house on state-owned land. Obtaining the legal authorization of ownership required 728 steps. Similarly, it took 289 six-hour days of work by his team, as well as $1231 in prepayment fees, to legally open a small garment workshop in the same country, an objective that was accomplished in a single morning in the United States. Moreover, taking into account the fact that $1231 for a Peruvian represents approximately thirty-one times the monthly minimum wage, one can understand why so many people prefer the black market. De Soto´s team conducted similar investigations in the Philippines, Egypt, Haiti, and other Third World countries with the same kind of striking and discouraging results.[2]

Given these barriers to formal property, the creation of capital in these countries is nearly impossible. And the solution is not "that leaders of the Third World and former communist nations wander the world's foreign ministries and international financial institutions seeking their fortunes" (p. 37), but to make formal property universally accessible (p. 218).

This is so, de Soto claims, because the poor in these countries already own an incredible amount of land, houses, and businesses. They own capital, but of a special kind: "dead capital," capital that is not officially recognized.

By the calculations of the author's team, "the total value of the real estate held but not legally owned by the poor of the third world and former communist nations is at least $9.3 trillion" (p. 35). By comparison, the foreign aid or assistance from developed state governments to their Third World colleagues is relatively insignificant. Likewise, the value of this real estate is more than twenty times the

[2]A similar analysis of the U.S., Hong Kong, and India can be found in John Stossel, *Is America Number One?*, ABC News Home Video, 1999, videocassette. Stossel found that he could go into business in Hong Kong in one day, and in New York City in a few weeks, but in India it would take several months at least, and possibly several years.

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total direct foreign investment made during the 1990s into all Third World and former communist countries.

But how could the simple formal recognition of property be the solution for the development of Third World and former communist nations? Continuing along the same line, de Soto argues that easy and universal access to formal property would allow people to generate productive capital. Formal property enables people to think about assets not only as physical materials, but also as "the description of their latent economic and social qualities" (p. 51). It integrates dispersed information into one standardized and integrated legal representational system, thereby making people accountable, since it shifts "the legitimacy of the rights of owners from the politicized context of local communities to the impersonal context of law" (p. 54).

The standardization that brings about formal property also serves to make assets fungible, thereby reducing transaction costs involved in mobilizing and utilizing assets. Moreover, these effects convert people into "a network of individually identifiable and accountable business agents" through which they can conjoin their assets into more valuable combinations (p. 61). Finally, this network created by a formal property system constitutes a protection of property records (titles and contracts) every time they are involved in transactions in time and space.

Reduced to its bare essentials, de Soto's argument is that an easy, universal, and integrated system of formal property enables people to use their assets to produce and accumulate capital. Hence, the argument runs, formal property is the key to the division of labor and increase of productivity; thus, it is the key to the success of capitalism in the Third World and former communist nations. Likewise, in the international arena, it is the tool with which to take advantage of the globalization process.

In order to illustrate his argument, de Soto turns to the American experience. He shows that the problems now facing Third World and former communist countries are not new. Not so long ago, the citizens of North America had to struggle against their governments and their privileged elites in order to receive recognition of their property over the resources they already controlled. Only then did the U.S. begin the process of capitalization that made this country what it is today: a rich, capitalized country.

There may be nothing logically wrong with this explanatory chain, so far as it goes. Unfortunately, as soon as you go beyond the main

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arguments, the structure of his hypothesis loses balance, and the entire edifice loses its value as a coherent defense of property rights and capitalism as the salvation for developing countries.

While *The Mystery of Capital* is full of statements concerning the need for the formalization of private property, nowhere does it offer a definition of "private property." Likewise, the book makes no effort to define what kinds of goods can be the object of a rightful appropriation, much less when such rightful appropriation can occur.

How, then, does the author articulate property rights? And why should they be defended? De Soto's defense of property rights is not grounded on justice, nor is it a pure, logical defense. Rather, de Soto takes an extremely narrow utilitarian approach based on efficiency and rooted in social contract. He argues that property derives its legitimacy from "social contracts that determine the existing property rights" (p. 172).

De Soto even appeals to Kant against Locke when he writes that "all property rights spring from social recognition of a claim's legitimacy" (p. 171). But if a "social contract has to precede real ownership" (p. 171), how is it possible to have a valid social contract where the contracting parts do not own themselves? To be sure, if individuals can make a contract, it is because they own themselves, and if they have to own themselves to make a contract, it follows that property has to precede contracts. If it does not, only violence, and not peaceful contract, is possible.

In this context, why does de Soto believe that formal property must be universally accessible? To this question he has a clear answer: "to bring everyone into one social contract where they can cooperate to raise society's productivity" (p. 218). However, this answer's utilitarianism does not allow it to escape the trap of circular reasoning. As far as I can understand this argument, property, and, therefore, formal property, requires a previous social contract, and, once it is legitimate, universal access to it must be defended because it unites everyone into one social contract. It may be that these two social contracts are totally different, but, if so, he should start the explanation from the beginning.

Once this problem is seen clearly, the reader is not astonished that de Soto finishes the book by saying,

> I am not a die-hard capitalist. I do not view capitalism as a credo. Much more important to me are freedom, compassion for the poor, respect for the social contract, and equal

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> opportunity. But for the moment, to achieve those goals, capitalism is the only game in town. It is the only system we know that provides us with the tools required to create massive surplus value. (p. 228)

Another interesting question is who should be in charge of recognizing ownership, since this is the way that de Soto plans to solve the whole problem. For the author, the answer is clear: the State, through its group of managers (the government), is the ideal agent to remedy the chaos created through its previous policies. In fact, de Soto's vision of government is not one that passively allows people to arrange their own lives; rather, he desires a government that actively moves people in the right direction (possibly through the government's contracting with a private company that will search for the needed information). Thus, de Soto reasons that

> [c]itizens inside and outside the bell jar need government to make a strong case that a redesigned, integrated property system is less costly, more efficient, and better for the nation than existing anarchical arrangements. (p. 159)

In the same vein, de Soto reminds governments that "without the tools of formal property, it is hard to see how . . . tax collection [could] work" (p. 60). Later, he states that

> Formalization will provide government . . . with . . . taxes . . . . In addition, a formal property system supplies a database for investment decisions in health care, education, tax assessment, and environmental planning. (p. 195)

In view of all this, it should not amaze anybody that the author dedicates six pages to the bright side of Marx (pp. 212–18). While do Soto is clearly not a Marxist, his "facing up to Marx´s ghost" turns out to be a cheerful reading of several Marxist concepts, especially his class theory. For example, de Soto writes that when people are extremely dissatisfied, "the Marxist tool kit is better geared to explain class conflict than capitalist thinking, which has no comparable analysis or even a serious strategy for reaching the poor in the extralegal sector" (p. 213). Marx divides social classes according to ownership of the means of production, and de Soto adapts this theory to his main claim, i.e., that classes exist because some people have access to formal property, while others do not; the latter, then, are condemned to poverty (p. 213).

Although this view is popular and prevalent, it is incorrect. One can hardly contend that Marxist class theory is richer in explanatory

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power than, e.g., Oppenheimer's.[3] It makes far more sense to point out that some individuals—especially those in government—impose access restrictions on others. By specifying who can use force to constrain access to non-owned scarce resources, the government creates the very classes that de Soto and Marx claim are products of the economic system. Once we recognize this, we can apply it to formal property by making the distinction between individuals who use political power—who use violence or the threat of it to prevent others from gaining access to the full exercise of their property rights—and individuals who do not use means that violate the property of others, or prevent them from formalizing it.

As long as someone can legally use force or political power for aggression against another's property, it is possible to differentiate between two distinct classes. And, by the way, this is a perfectly capitalist analysis of the problem. Unfortunately, de Soto is inconsistent on this issue. He sometimes disregards the use of violence against non-aggressors, and relies on the ownership of factors of production as his yardstick of a class theory; at other times, he correctly points out how official documents have been used for outright domination. If de Soto consistently and explicitly applied the latter distinction, he would not be stuck trying to restore Marxist class theory to explain visible class distinctions.

Once this analytical tool is adopted, it becomes puzzling how an institution whose main feature consists in being the legal monopoly of the use of violence against aggressors and non-aggressors, as well as being the ultimate judge of all disputes, can be the guarantor of formal recognition of property. Instead of recognizing this problem and calling for a halt to government aggression in this field, de Soto relies on a change in the way politicians use political means and legal violence (p. 205). His proposed solution seems to rely on a state takeover of the competing extralegal organizations that currently administer formal property access.

Other obscure points of this book are his out-of-place, or at least disproportionate, attack on lawyers as the most probable saboteurs of the necessary reforms (pp.197–201), his incorrect use of the term "anarchism" (pp. 30, 159, 175), and his poor and unconvincing defense of patents and copyrights (pp. 70, 83–84, 198, and 224).

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[3]See Franz Oppenheimer, *The State: Its History and Development Viewed Sociologically*, trans. John M. Gitterman (New York: B.W. Huebsch, 1922).

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Finally, the book seems to follow from a good intuition—that you cannot have development without respect for property, and that you cannot understand poverty or underdevelopment while disregarding the formal situation of property rights. But in the book itself, this argument goes only so far. You cannot hold that, once you create a framework where formal property is easily accessible for everyone, development will be attained. It is true that, once you have a society where legitimately acquired property is respected, development would obtain or, at least, the best possible condition for development would exist.

This environment can be reached by a voluntary restraint on aggression against other people's property, or by using force to defend legitimately acquired property. In the case where others do not engage in voluntary restraint, we will need to defend property against aggressors. Such a defense can be undertaken directly by the property owner, or by contracting for it with a third party or agency. In this context, formal property is just one factor that can be helpful in the defense of property rights.

We still have to look at what kind of institution or agency would certify this formal property, and, what is even more important, at the very definition of property rights that the agency would use. During the National Socialist period in Germany, formal property was respected more fully than in many developed countries, but this did not prevent property from being practically and legally managed from the Reichstag. Given enough time, the productivity and capital structure in Germany would have collapsed in a way similar to its subsequent collapse in socialist countries.

Ultimately, and contrary to de Soto, while the formalization of property rights might be of great importance for their respect and, hence, for the development of a society, it is neither a sufficient nor a necessary condition.

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LELAND B. YEAGER. *ETHICS AS SOCIAL SCIENCE: THE MORAL PHILOSOPHY OF SOCIAL COOPERATION.* CHELTENHAM, U.K.: EDWARD ELGAR, 2001. PP. viii + 299.

I find myself in an odd position. Had I read Professor Yeager's book a year ago, I would have heralded it as a fine contribution to the clarification of a sophisticated (and *correct*) utilitarianism. True, there would have remained (in my opinion) one yawning chasm yet to be satisfactorily explained by the utilitarians, but this wouldn't have bothered me too much; after all, science never rests, and can only push back the boundaries of our ignorance.

I now realize that what I had thought was a minor shortcoming of utilitarianism (explained below) is, in fact, a devastating weakness. Yeager's book ingeniously deals with many criticisms, yet fails in this vital regard. Just as it was necessary to discard the Ptolemaic models of the solar system (which *were* helpful in many respects), it is time to discard utilitarianism in favor of a new approach to ethics.

YEAGER'S APPROACH

Yeager advocates a utilitarianism of the variety articulated by Mises in *Human Action*.[1] The normative terms *good* and *bad* make sense only in the context of society, and something (be it an action, law, or ideology) is morally good only insofar as it promotes human happiness or satisfaction. Because of the nature of human interaction (a nature discovered by the positive economist as well as by other scientists), *social cooperation* is the means by which individuals satisfy their diverse, subjective ends. Thus, ethical issues can be reduced to the expected strengthening or weakening of social bonds. In short, what promotes cooperation is good; what hinders it is bad.

I am but an amateur in the field of ethics, so I will not comment on the complicated web of arguments and counterarguments that Yeager references in his book. (Indeed, I often found myself unsure whether Yeager agreed or not with the remarks he paraphrased from a given author.) My relative ignorance notwithstanding, I am confident that *Ethics as Social Science* is the single best reference on modern utilitarianism for the serious student (whereas Henry Hazlitt's *The Foundations of Morality*[2] is a better introductory book).

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[1]Ludwig von Mises, *Human Action: A Treatise on Economics*, 3rd rev. ed. (Chicago: Contemporary Books, 1963).

[2]Henry Hazlitt, *The Foundations of Morality* (Princeton, N.J.: Van Nostrand, 1964).

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RULE VERSUS ACT UTILITARIANISM

A major shortcoming of the book is Yeager's harsh treatment of those who deviate even slightly from his own position. This is particularly embarrassing since, at times, Yeager himself apparently makes the very mistakes for which he castigates his opponents. This is nowhere better demonstrated than in his discussion arguing for rule (or indirect) over act utilitarianism.

Act utilitarianism requires that everyone "act in whatever way promises to contribute most to the aggregate excess of happiness over misery, taking full account of all effects of the possible actions compared" (86). One would think that Yeager would at least sympathize with this notion. Not so:

> Although [act utilitarianism] illuminates more plausible positions by contrast, it is hard to believe that any philosopher actually advocates it. . . . Although ethical precepts are not objective realities naturally graven in stone, a moral code could hardly be meaningful if it were open to wholesale reconsideration by each individual at the time of each particular decision. Such continual case-by-case reconsideration would come close to a situation ethics and to not having a moral code after all. Rules and codes are best appraised outside the context of immediate decisions.
>
> Successfully applying act utilitarianism would presuppose impossibly great information and foresight about consequences of individual actions—intended and unintended, nearby and remote, immediate and delayed. . . . It overlooks the temptations and excuses that people find to take advantage of vague or pliable rules. (pp. 86–87)

Yeager apparently misses the great irony here in the fact that the bulk of his arguments have been advanced by others against utilitarianism *itself*, act or otherwise. Inasmuch as most of his objections relate to the *feasibility* of act utilitarianism, wouldn't these considerations be handled under its "taking full account of all effects" clause? For example, the act utilitarian could agree that individuals disregarding widely held moral precepts would lead to long-run misery, and for this very reason would reject any such individual acts as immoral.

In contrast to naïve act utilitarianism, Yeager advances a rules version; rather than acting in each case to maximize happiness, individuals should instead adopt ethical precepts that foster social cooperation (and thus happiness). But this is a false dichotomy. On the one hand, if individuals were ordered to follow the single rule, "Always

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act to increase human happiness," this would merely reduce to simple act utilitarianism. On the other hand, if the rules became so numerous and complicated that they covered every possible situation, this would also reduce to act utilitarianism.

Any serious ethical code must propose a set of rules that lies somewhere between these two extremes, if for no other reason than the limits of human memory. But wherever this line is drawn, we know that there exists a *superior* (from a utilitarian point of view) set of rules that cannot be advocated simply because of their complexity. Furthermore, it would lead to widespread uncertainty if moral philosophers were constantly reevaluating the precepts of the ethical code. Indeed, we could say, parallel to Yeager's argument against act utilitarianism, that successfully applying rule utilitarianism would presuppose impossibly great information and foresight about consequences of individual rules—intended and unintended, nearby and remote, immediate and delayed.

In light of the above considerations, one might find it hard to believe that any moral philosopher could seriously advocate rule utilitarianism.

The Problem of Aggregation

Ever since its earliest prescription of seeking the greatest good for the greatest number (an empty formulation that even Bentham himself subsequently abandoned), utilitarianism has been plagued by the problem of aggregation. Even setting aside the (devastating) issue of interpersonal utility comparisons, the utilitarian must decide whether to maximize total, average, or median utility. This decision will lead to different policy recommendations. If the goal is *total* utility, for example, then population growth will likely be favored. Championing "happiness" is not enough; the utilitarian must be *specific*.

Yeager is aware of these alleged problems—he feels "almost outrage at the slipshod scholarship they betray" (p. 112)—yet he does little except deny that such criticisms apply. This is a standard tactic for Yeager. For example, he admits that

> the social philosopher or policy advisor cannot avoid all *semblance* of a maximizer's viewpoint. Whatever his conception of the general good, he must have some notion of institutions and rules serving it better or worse. Although desiring the best in this harmless sense, the utilitarian does not envisage maximizing some quasi-homogeneous substance. . . .

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> In a benign way, impartiality has some affinity with this faint semblance of a maximizer's view. The detached mood appropriate to a social philosopher or policy advisor *does* in a sense require regarding individuals equally as "statistics," so to speak. . . .
>
> Anyway, the detached mood cultivated by such a conception does not require forgetting that each person is special to himself and within his own circle. A utilitarian recoils in horror from empowering any authority to manipulate individuals as mere statistics. (pp. 115–16)

But a reader curious as to how Yeager's "harmless" and "benign" utilitarianism—in contrast to the outrageous caricatures of its critics—is actually to be implemented (or even defined) will find little elaboration. This is most distressing, for unless he sticks to generic statements such as "murder reduces human happiness," the utilitarian will need to seriously address the problems of calculating the "general good."

MISES'S ILLUSORY SOLUTION

Ludwig von Mises cleverly sidestepped the problems of traditional utilitarianism. No appeal to idiosyncratic intuitions or false altruism and no reliance on invalid utility comparisons or aggregation were necessary. There was no conflict between the demands of morality and self-interest. Since the vast majority of people can achieve their ends only through the benefits of the division of labor, it is within their "rightly understood interests" to refrain from antisocial actions. Against the superstitious doctrines of natural law and mystical creeds stands the practical man and his use of reason to attain his goals:

> [I]t is obvious that the appeal to justice in a debate concerning the drafting of new laws is an instance of circular reasoning. . . . [The notion of justice] makes sense only when approving or disapproving concrete conduct from the point of view of the valid laws of the country. In considering changes in the nation's legal system, in rewriting or repealing existing laws and writing new laws, the issue is not justice, but social expediency and social welfare. There is no such thing as an absolute notion of justice not referring to a definite system of social organization. . . . There is neither right nor wrong outside the social nexus.[3]

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[3]Mises, *Human Action*, p. 717.

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Mises tries to avoid the vexing problem of value judgments by assuming that the vast majority of people prefer the security and material comforts of civilization over the temporary thrills of aggressive behavior. But this alone does not make it rational to obey the dictates of morality. The economist can rightfully observe that if *everyone* behaves ethically, we will all be better off. Such an argument, however, violates the cherished Austrian principles of marginalism and individualism. It is true that a society suffering from widespread theft would be intolerable, even from a thief's point of view; but any individual robbery has little impact on the overall level of crime. If everyone became an engineer, humanity would also perish; this does not prove engineering to be an immoral profession.

This was the lingering doubt I had always had; utilitarianism can give the individual no good reason to obey, in all cases, the rules it prescribes for the good life. Yeager himself has the courage to admit this, in the sense that certain situations call for a genuine sacrifice of one's interest to "society" (p. 186). (Yeager does provide thoughtful remarks concerning the role of character and ingrained habits, although, strictly speaking, the rational individual should lament that such psychological constraints apply to *himself*.)

If, indeed, there is nothing behind morality besides expediency, then the egoist should not feel bad for violating "rules" when he can profit (all things considered) from doing so. One possible response —that a general ethical code by definition must apply to everyone— is just as superstitious as any natural law principle that Mises and Yeager ridicule.

Weak Defenses, Poor Foundations

Another problem with Yeager's utilitarianism is its vacuity. Judging by his responses to certain arguments, it appears that his system comes close to being non-falsifiable. Yeager, who reminds his reader in several places (e.g., p. 143) that he is more "scientific" than many of his critics, will certainly be concerned with such a charge. To demonstrate this, let us consider Yeager's treatment of a sophisticated argument against utilitarianism. (Note, too, Yeager's less-than-disinterested tone.)

> An example contrived by J.A. Mirrlees . . . affords insight into what the critics may have in mind when complaining about aggregation (and if they are not just mindlessly echoing one another). Social welfare is the arithmetic sum

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> of the utilities of society's two members, Tom and Dick. Both have the same utility function with plausible properties. . . . Intuitively [and as a result of the specified properties], working a lot leaves a person less time and capacity to enjoy income, and having a large income reduces one's willingness to work. The production function is very simple: 1 unit of Tom's labor produces 2 units of real income, while 1 unit of Dick's labor produces only 1 unit of income. Only in their productivities do the two men differ.
>
> On these radically simple assumptions, straightforward calculus shows that maximizing social welfare requires Tom both to work more hours and also to receive less income than Dick. Tom, though more productive, is unequivocally the worse off of the two. . . . Tom has both absolute and comparative advantages over Dick in transforming labor into income. In transforming income into utility and welfare, Dick has neither an absolute advantage nor an absolute disadvantage, but he does have a comparative advantage. Tom should therefore specialize in producing income and Dick specialize in consuming it. . . .
>
> Any (imaginary) utilitarian who remained content with considerations of this sort would be committing grave oversights. Most obviously . . . he would be overlooking incentives. . . . Considerations of fairness must also enter into any even halfway sophisticated version of utilitarianism. *An ethical code cannot promote the welfares [sic] of individuals unless it commands wide adherence, which it cannot do if seen as grossly unfair.* (pp. 113–14, emphasis added)

It is this latter counterargument that troubles me. What more can the critic do than to show that utilitarianism, while obviously plausible in certain cases, leads to absurdities in other cases? Yeager seems to come very close to the following defense:

- The critic argues that utilitarianism would imply monstrous consequence X.
- People do not like monstrosities.
- Therefore, by its very definition, utilitarianism must not imply X after all.

Not only does Yeager defend his system poorly, he doesn't even state it well. He tries to avoid the charge of vacuity in a formal sense by pointing out that other systems offer all sorts of ultimate criteria

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that differ from his own. What, precisely, *is* Yeager's criterion? We already know that, in the rough-and-tumble over specific situations, the issues get absurdly confused. So, broadly speaking, *what* does Yeager advocate?

> Social cooperation is only a *nearly* ultimate criterion. It serves some further value taken as desirable without argument. . . .
>
> Utilitarians can only take stabs at labeling what they deem ultimately desirable. It is individuals' success in making good lives for themselves, or fulfillment, or satisfaction, or life befitting human potential, or what Aristotle called eudaimonia. No single word is adequate. When one is required, however, "happiness" is the traditional choice. . . .
>
> Even though choice of an ultimate criterion or value must be a matter of intuition, intuition may be cultivated reflectively. . . . Happiness or some such concept (perhaps "flourishing") will prevail over rival criteria—or so I conjecture. (pp. 82–83)

Yeager seems to feel that any concern for happiness makes one a utilitarian by definition. But this is not so. A natural law theorist, for example, can mention without embarrassment the misery that socialism would entail. In an analogous way, one can reject a proposed ethical system because it contains contradictions; this rejection would not christen "logical consistency" as one's ultimate ethical criterion.

What Utilitarianism Lacks

Utilitarianism seems to rob the words *good* and *bad* of their specifically ethical character. The utilitarian cannot make a distinction between guilt and simple error. Ill-informed legislators who impose rent controls have made a mistake in *qualitatively* the same sense as investors who go bankrupt.

Any decent ethical system must involve *intentions*. If consequences are really all that count, then a natural disaster is far more "evil" than a serial killer, and the drunk driver is just as morally culpable as the assassin.

More serious still, for any supposed "scientific" ethics, is the utilitarian's inability to provide definite answers on real-life ethical dilemmas. The fact that devout utilitarians disagree on every major

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issue, whether abortion, animal rights, or the death penalty, proves that their approach is just as susceptible to personal whims as is any other ethical system.

A Quibble Concerning Tone

Besides these major issues, another aspect of *Ethics as Social Science* troubles me. As implied above, Yeager at times appears rather partisan. He voices actual "outrage" over the unsympathetic treatment of utilitarianism by certain critics, yet he himself yields to caricatures of *his* opponents. For example, he accuses Walter Block of

> an unintended, unrecognized, and paradoxical statism—the unarticulated idea that the state is responsible for suppressing all evil and promoting all good and that something the state should not suppress is by that very token not evil and perhaps even good after all. (p. 276)

Although I agree that Block, in his *Defending the Undefendable*,[4] at times overstepped (e.g., in the case of counterfeiters), this possible error in no way implies statism. (Rothbard explains in the book's Foreword the intentionally shocking sense in which Block uses the term "hero.") I cannot see how Yeager reached his conclusion except for its utter irony in light of the professed anti-statism of his opponent.

In discussing Murray Rothbard's natural law defense of blackmail on the grounds that the legal and the moral need not coincide, Yeager, incredibly, wonders whether this distinction is valid after all (p. 279). Surely Yeager must be familiar with the standard arguments for drug legalization; his criticisms of Rothbard in this regard are incomprehensible.

Conclusion

Although it provides a thoughtful tour of previous work and offers a few novel arguments, Leland Yeager's *Ethics as Social Science* ultimately fails in its attempt to rescue utilitarianism from its many flaws. By focusing almost exclusively on (allegedly incorrect) criticisms, the book fails to make a strong case *for* utilitarianism.

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[4]Walter Block, *Defending the Undefendable: The Pimp, Prostitute, Scab, Slumlord, Libeler, Moneylender, and Other Scapegoats in the Rogue's Gallery of American Society* (New York: Fleet Press, 1976).

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Obviously, the insights of utilitarian thinkers are quite valuable. Any ethical doctrine must take account of the consequences of its prescribed behavior. Yet, recognition of this truism cannot overcome objections of the sort raised above. Precisely because thinkers of the caliber of Yeager, Mises, and Hazlitt were unable to expound the doctrine in a satisfactory way, I have come to believe that such an exercise may be impossible.

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A SYMPOSIUM ON FEDERALISM, WAR, AND RECONSTRUCTION: ANTECEDENTS AND CONSEQUENCES OF THE WAR BETWEEN THE STATES

TOM WOODS, GUEST EDITOR

This issue will include articles by **Donald Livingston** on the extent of the Confederacy's moral availability to Libertarians; **H. Lee Cheek** on Calhoun, sectionalism, and the idea of a concurrent republic; **K.R. Constantine Gutzman** on changes in Calhoun's political thought; **Tom DiLorenzo** on the role of Reconstruction in cementing a big government ideology; and **Joe Stromberg** on a "plain folks" perspective on Reconstruction.

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